

THE

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TOUCH-STONE  
OF  
COMMON ASSURANCES:

OR, A  
PLAIN and FAMILIAR TREATISE,  
OPENING THE  
LEARNING of the COMMON ASSURANCES,  
OR  
CONVEYANCES of the KINGDOM:

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By WILLIAM SHEPPARD, Esq;  
Of the MIDDLE-TEMPLE.

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THE SIXTH EDITION:

Revised and corrected, with NOTES and additional REFERENCES,

By EDWARD HILLIARD, of LINCOLN'S-INN,  
BARRISTER at LAW.

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TO WHICH IS ADDED,  
A C O P I O U S I N D E X.

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(DEDICATION TO THE FORMER EDITIONS)  
TO THE RIGHT  
W O R S H I P F U L  
T H E  
BENCHERS of the MIDDLE-TEMPLE,  
A N D  
To the Rest of the GENTLEMEN  
O F T H A T  
S O C I E T Y.

GENTLEMEN,

I May perhaps have been so long out of your sight, that I may be also by this time out of your mind. Nevertheless, it is not out of my mind, that I having received the seed and growth of that little knowledge in the laws of this kingdom which God hath given me in the seed-plot of your ancient and honourable SOCIETY, do no less (by a natural equity) owe the fruit thereof to you, than the rivers do their tribute to the ocean, and the trees their fruit to the planters and pruners. This therefore (such as it is) although unworthy of so great a name, I am bold to dedicate to you, and put forth under the shelter of your favourable wings; beseeching you to accept thereof, and my well meaning therein, and to honor it with your patronage and countenance, and it will much oblige,

Gentlemen,

Your most humble Servant,

*W. S.*

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# THE EDITOR'S ADDRESS TO THE PUBLIC.

(Prefixed to the FOURTH EDITION.)

THE fate of the book, now reprinted, has been somewhat singular. For a long time the *Touchstone* lay on the stalls of the second-hand booksellers in *Moorfields* unnoticed, and of no repute. The late Lord Chief Justice *Willes* was the person who rescued it from unmerited neglect, by the high character he gave it in the court where he presided: His powerful encomium, together with the importance of the subject-matter of the book, the method observed in it, and the authorities upon which its doctrine is established, have contributed to give the work that reputation which is fully confirmed by its present scarcity.—Tho' this treatise bears the name of *Sheppard*, yet doubts have arisen whether it be really his performance; if we consider that this was given as Mr. *Sheppard's* first publication, and compare it with his subsequent productions, the earliest work will be found to bear the marks of the maturest judgment. This circumstance, together with the report which has prevailed even to this day, that he is not entitled to the credit he has assumed, seems to justify the doubt; and the assurances made by the friends of the late Judge *Doderidge*, that the manuscript, so congenial to his abilities, was found among his papers, favour the supposition long entertained, that Mr. Justice *Doderidge* was really the author of the *Touchstone*.—From a printed copy of this work, which belonged to that very eminent conveyancer the late Mr. *Booth*, and is now in the possession of Mr. *Holliday* of *Lincoln's Inn*, the editor has been permitted, for the information of the curious reader, to transcribe the following note, written in Mr. *Booth's* own hand in the title-page, “No part of this book is *Sheppard's* but the Title, for it was originally wrote by Justice *Doderidge*, whose library *Sheppard* purchased, where, among other books, he found the original manuscript of this treatise, and afterwards published it as his own. Sir *Creswell Levinz* had seen the manuscript in Justice *Doderidge's* hands, and from him Mr. *Pigott*, who was my author, had this information.—A report, propagated by persons so respectable, amounts almost to a certainty—Be this as it may, the credit of the work is now so well established, that, were its presumptive lineage indisputably proved, it could not easily increase in reputation.—Mr. *Pigott*, the author of the celebrated Treatise on Recoveries, had so just a sense of the merit of the *Touchstone*, that he took the pains to compile a copious  
and

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and correct index thereto, now first published, but with some additions. The original, in Mr. *Pigott's* own hand-writing, is also in the possession of the gentleman above named.—It is not within the bounds of this address, nor the intention of the editor, to specify the various subsequent writers who have availed themselves of the *Touchstone*, by making liberal extracts therefrom, tho' they have not had the gratitude to acknowledge the source of their information. Those who will take the pains to compare any of the chapters in this work, with later treatises on the same subjects, will find the truth of this observation, which is intended rather to mark the authority of this book, than to depreciate that of others.—On a thorough examination, it is presumed this work will be found to contain as excellent a *Theory of Conveyancing* as any extant; it is therefore now printed on the same sized paper with *Horsman's* Precedents, in order that such gentlemen in that particular branch, who incline to the opinion just mentioned, may, by adding this volume to those precedents, form a compleat body of conveyancing.—The universal esteem in which the *Touchstone* has been held, not only by conveyancers but by the profession in general, principally induced the editor to reprint it.—The humble merit of an editor is chiefly confined to correctness; in endeavouring to attain which, he found it necessary *after the third chapter to alter the old orthography*, by omitting the “e” final, which in the former editions was sometimes inserted and sometimes omitted in the same word, even where it happened to be repeated in the same period.—The public will not require an apology for being presented with what has been long wanted, a new edition of so valuable and excellent a work: but an apology is due from the editor for submitting to the inspection of the learned, tho' not without the approbation of some friends, the few notes which he has ventured to subjoin, and which originally were intended for his private use.—He assumes to himself no merit from this edition; but as the law, and particularly this branch of it, has received many material alterations and improvements since the last edition of this work, it is now become the duty of an editor to endeavour to point out the most important of such changes: he is therefore led to hope, that the student, may find among the notes, some that are useful.—It has been his chief aim to make them clear and concise, and to render them serviceable by referring to the general books on the subject, and occasionally to cases and statutes.—He does not pretend to have compared the numerous references of the original, tho' there are some which he has occasionally rectified; but he has endeavoured to be particularly attentive to the correctness of those he has added.—Tho' no pains or attention have been spared to render this edition as correct and useful as possible, yet the editor is convinced from the consciousness of his own inability, and the extensive variety of matter comprehended in this work, how much he stands in need of the utmost candour of the public.

Lincoln's Inn,  
12th Jan. 1780.

EDWARD HILLIARD.

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# P R E F A C E

T O T H E

## F O R M E R E D I T I O N S.

To the R E A D E R.

**C**OURTEOUS Reader, I do desire in all plainness to be understood, that having, in the time of my study of the LAWS of this Realm, collected some confused NOTES and OBSERVATIONS out of the same: and being afterwards willing (for God knows I had no further end or aim at first in them) for my own private help and better readiness, to digest them into some order and method, such as my understanding could best contrive. The which things, thus prepared and lying by me, came by chance to the view of some more learned than myself, who seemed to give some good approbation thereunto. Whereupon I first of all began to bethink myself of making some part thereof public. And having to that purpose advised with some of my more judicious friends, and being encouraged by some, and not discouraged by others, I did at last resolve to attempt to publish and put in print the same. And calling to mind that the COMMON ASSURANCES and CONVEYANCES of the Kingdom (whereupon the whole estates, and consequently the livelihoods, of very many depend) are matters of great importance, and that concern most men; and that therefore the legal learning thereof must needs be of great and daily use. And considering withall the mischief arising every where by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now almost in every parish an unlearned, and yet confident, pragmatistical attorney, (not that  
I think



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I think them all to be such,) or a lawless scrivener, that may perhaps have some law books in their houses, but never read more law than is on the backside of *Littleton*, or an ignorant vicar, or it may be a blacksmith, carpenter, or weaver, that have no more books of law in their houses, than they have law in their heads, and yet as apt and able (if you will believe themselves) either to judge of a conveyance, and by the rules of law (of all which they are utterly ignorant) to determine of the strength and goodness of a title or estate already made, or to make a conveyance to transfer the property of things from man to man, as the most learned and best counsellor of them all; and therefore undertake with great confidence, and dispatch without any scruple, any business whatsoever offered to their hands: wherein they deal with men in their estates, as many that are called physicians (but in truth empiricks) deal with men in their bodies, (an evil fit for the consideration of parliament). How they come to this their supposed dexterity and skill is a wonder, except that saying be false, *Nemo nascitur artifex*. Either it must be born with them, or they must have it by education, or they must not have it at all. But if they will tell me they have good precedents, I will tell them that a good conveyancer must be as well able to judge of the validity of the title, and primitive estate of him that is to convey, (which a man can never do without knowledge of the rules of law, no more than a blind man can judge of colours,) as to make a derivative estate and conveyance by a good precedent; for *scire est per causas scire*, as the philosopher speaks. And as well, for ought I know, may a man be an able physician by certain medicines only, that never read so much as the grounds of physick, as such men be able conveyancers by their precedents only, that never read so much as the maxims of law: *Nullum medicamentum idem est in omnibus*. For my part I must ingenuously profess that I can scarce look into a title or meddle with a conveyance of weight, wherein I cannot make and move more doubts and questions, than I am able to resolve and answer; and therefore these men have gotten the start of me much. And yet much marvel it is to see how these empiricks of the law (if I may so call them) are sought unto and made use of, and that not only in lesser, but oft-times in greater and more weighty businesses, and that without the assistance of any others more able and sufficient; the  
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which is not for lack of opportunity of finding more learned men in the law, for there is a sufficient store of them in all places: nor do those that employ these empiricks of the law, always save (if they think it saved) money hereby; for, besides the great mischief which is oft-times done themselves by the unskilfulness of these workmen, some of them by reason of their much custom are grown more chargeable than an ordinary Counsellor, whose fee is certain and known. But of these empiricks of the law and those that make use of them, I might say as sometime our blessed Saviour said, *Let them alone, the blind leaders of the blind.* Howbeit being now called (as I conceive) hereunto, I chuse rather to admonish them and to tell the first sort, that I conceive them to be usurpers upon, and intruders into, other men's callings, and that they thrust their sickles into other men's harvest, and that they have not yet learned that rule of divinity, *To abide in the calling wherein they are called*, but exercise themselves in things too high for them; nor yet have they learned this, *Ne sutor ultra crepidam*, let not the cobbler go beyond his last; nor have they learned that, *In quo quisque norit in hoc se exerceat*; and let me tell the latter sort, that they heed not enough this saying, *Caveat Emptor*; nor believe that saying, *Cuique in arte sua credendum*, that every man is to be believed in his own art. But if you will say to me, that these men do their work well, and their work doth succeed well: I will say to you, that the blind may happily hit the mark; and it may fall out that sometimes they do their work well, and it doth succeed well, but oft-times woeful experience sheweth the contrary, and that many men have been much mischieved every where by the ignorance of these men. Wherefore I wish both sorts of them to doubt more and to be well advised in these affairs, as the law doth presume every one will be; for therefore is it indeed that a will hath a more favourable interpretation than a deed, because men's wills are oft-times made in haste, and it is presumed men take who they can to make them; but men for the making of their deeds are not put upon those straits, but they take advice of learned men therein. And the more to move men herein and to redress the evil before discovered, I have herein set forth, under certain general titles or common Places, the greatest part of the judgments, statutes, resolutions, and cases that do contain or concern the learning of the Com-

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MON ASSURANCES of the Kingdom ; so as I think I may truly say, under reformation, that there are few material things, as touching this subject, to be found any where dispersed in the volumes of the law, but they are to be found somewhere herein ; and that there shall not happen one case of a hundred, but a hundred to one the diligent reader may here find the case itself, or some case that by good inference may be applied to it. Not that I would have men now to rest upon this help, and be less careful and more careless to take advice of the lawyer than heretofore, (for this is the disease I labour to cure,) for although it may be that hereby these matters are made in some measure conspicuous, yet to say the very truth, besides that the subject matter of law is somewhat transcendent, and too high for ordinary capacities, the manner of putting of cases is so concise, the distinctions and differences of law are so many, that it is hard for any man, not well read in the laws in general, to judge or make use of any part of them in particular, and rightly and fully to apprehend and apply the things herein set forth : and therefore I dare not advise men to rest altogether hereupon, nor can I forbear to tell them it is very dangerous so to do. But my aims and ends, being also the uses and commodities I expect and look after from this work, are, first of all, that such men, before spoken of, may see by the view of the infinite variety of cases, points, and questions, as touching these matters, discovering also so many by-ways wherein men conversant therein may walk, how much there goes to making up of an able conveyancer, and that it is not so easy a matter to judge of a title, give advice upon a Conveyance, and make these Common Assurances, as men dream of, and that therefore men learn more to suspect themselves and others herein ; and to these it may serve as a light in a dark place. Secondly, that by this the lawyer and student may in some measure readily find together what he desires touching these matters ; and to him it may serve for a table or remembrancer. And lastly, that every man may be the better able by the help thereof to understand, open and put his own case to his lawyer, and to move more pertinent questions to him : and other uses I would have no man to make of it. In the use of this work therefore I must give thee two advertisements or caveats : First, that if thou desire to find any thing in particular therein contained,



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tained, that thou read the whole chapter, or at least the whole question and division of the chapter, wherein that thing is contained. And secondly, that thou dost not confidently build and rely upon any thing therein alone without advice from the learned lawyer also, or at least without a serious and judicious perusal of the authorities and books themselves to which thou art therein referred: *Melius est petere fontes quam sectari rivulos.* Some other things there are also here inserted, as falling aptly under the title, albeit they be not altogether pertinent to the subject matter. And all these sweet flowers of the law, growing *sparfim* in the great fields of the volumes of the Common and Statute Laws, have I thus painfully gathered, bound up and commended to thy charitable censure: no doubt but, in my desire to grasp and take up so much, I have taken and bound up some grass withall, which I hope shall not offend. If so be that I find it have a fragrant smell with thee, I shall think I have recompense enough for my pains. But if any man think me too presumptuous to attempt this enterprise, let him know first, that there is nothing of mine in it but the method, (and that not mine neither altogether,) the matter thereof being nothing else but the judgments, resolutions and opinions of the Judges of the law in succeeding times: and then as I have not trusted myself, so they shall not trust me altogether in these things. For I do freely acknowledge mine own weakness and want of judgment, and that I am the unmeetest and unworthiest of all men to undertake such a work, not one of a thousand, but the meanest of ten thousand. And this I have done is a poor something sufficient only to give them that are more learned, occasion to do something more exactly in this kind. If any man dislike the publishing of it in the English tongue, and think perhaps it may make the law to be the more despised, and the practitioner of the law the less regarded and used, I do wonder at the dislike of such a man: for to me there appears no more reason why to keep the laws in an unknown language that they may be kept from the knowledge of the people, than papists have to keep the scriptures and their prayers in a language unknown to the people; these being the laws by which the people are to be governed, and the law being the best inheritance of the subject. The wisdom of the Parliament hath thought fit  
to

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to commend all the statute laws to the people in English, and to appoint that the pleadings should be in English. And have we not many books of law in English already, as *Littleton's Tenures*, *Doctor & Student*, *Finche's Law*, Justice *Dodridge's Treatises*, *Coke upon Littleton*, the *Woman's Lawyer*, and many others? and are not these useful and profitable? and besides the greatest part of the proceedings in Chancery (the court of greatest employment within the Kingdom) are in English. And if it be meet any part of the law be in the native tongue, it should seem it is meet this part should be so, because it concerneth so many men, and them also so much, that they may see and understand somewhat in their own evidences. And therefore as we have turned their deeds from Latin to English, so let us also turn some of the law touching these deeds out of French into English. *Bonum quo communius eo melius*. And I see no reason why in law more than in physick the discovery of the art should make the art or artists the less regarded. But (under correction) I should think that it will rather make them both the more esteemed, as a jewel whose properties are known, and that it will make them the more, and other men we have before spoken of the less, to be used and employed in their affairs; for the more men know, they less they think they know, and the more they doubt; and nothing moves men to be so bold and confident in these matters as their ignorance, according to the proverb, *Who so bold as blind Bayard?* And for further answer to this, I wish men to see the preface of the Lord *Coke upon Littleton*. And if any man have any thing else to object and except, (for some there are that will neither put forth their own strength to do good, nor bear with others that do so,) I wish them to undertake the same subject, and to perfect and supply my defects. And so committing thee to God, and this work to thy favourable censure.

I am thy true friend.

W. S.

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THE



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## ADVERTISEMENT.

**I**N the present edition, the three first chapters only are reprinted, a smaller number having been printed of them than of the succeeding chapters.—The great demand for this book having exhausted above six hundred copies since the publication of the fourth edition in the year 1780, the editor has been induced to correct the orthography, and make the former more consistent, in that respect, with the latter chapters.—He has likewise added some few notes and references to publications and decisions since the last edition.

E. H.

Lincoln's Inn,  
6th Feb. 1784.

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I

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THE  
TOUCH-STONE  
OF  
COMMON ASSURANCES.

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CHAP. I.

*Of Common Assurances in general.*

**T**HE common or general assurances or conveyances of the kingdom (being that by which commonly the property of things is made or changed) are of two sorts, or are made two manner of ways, viz. either by matter of record, or by matter of deed. Those that are made by matter of record also are made either by matter of record of a more high nature and extraordinary way, or by matter of record of a more low nature and ordinary way. Those assurances that are made by matter of record of a more high nature, are such as are made by act of Parliament, of which we intend not to treat at all, neither do we intend to meddle with those assurances that are made by the King unto his subjects, as being matters more transcendent and intricate; but, those we intend to treat of are only the common assurances or conveyances that are made between subject and subject, and are of ordinary and daily use for the transferring of the property of lands, tenements, and hereditaments from one man to another. And of these there are observed to be ten kinds; two whereof are made by matter of record, as a fine, which is said to be a feoffment of record, and a common recovery, which is in the nature also of a feoffment of record; and the rest are by matter of deed; as first, by feoffment; secondly, by grant; thirdly, by bargain and sale, by deed indented and inrolled; fourthly, by lease; fifthly, by exchange; sixthly, by surrender; seventhly, by \* release or confirmation, both which are in nature of grants; eighthly, by devise, or by last will and testament. And some of these also serve to transfer the property of other things, as well as of lands, and some of them also have other operations and uses, as well as to change and alter property, and pass things from one man to another, as will appear in their proper places. And the first thing we shall begin upon, shall be the learning of a fine and common recovery; and first, of a fine.

B

CHAP.

*A. B. in the small  
is not a record but  
a thing recorded.  
\* P. 2. 2 Co. Litt. 251  
363  
1640. 186*

## CHAP. II.

## Of a Fine.

Fine, *quid*.

**T**HIS word is ambiguously taken in our law; for sometimes it is taken for a sum of money or mulct imposed or laid upon an offender for some offence done, and then also it is called a ransom. And sometimes it is taken for an income, or a sum of money paid at the entrance of a tenant into his land: and sometimes it is taken for a final agreement or conveyance upon record, for the settling and securing of lands and tenements; and in this sense it is taken here, and so it is defined by some to be, an acknowledgment in the King's court of the land, or other thing, to be his right that doth complain: and by others, a covenant made between parties and recorded by the justices: and by others, a friendly, real, and final agreement amongst parties, concerning any land, or rent, or other thing, whereof any suit or writ is hanging between them in any court: and by others, more fully, an instrument of record of an agreement concerning lands, tenements or hereditaments, duly made by the King's licence, and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the Justices of the Common Pleas, or others thereunto authorized, and engrossed of record in the same court, to end all controversies thereof, both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time (1). And in every fine there is a suit supposed, wherein the party that is to have the thing is called the plaintiff, and sometimes also in another respect the conusee or recognisee; and the other that doth depart with the thing, is called the deforçant (2); and sometimes, in another respect, the conusor or recognisor. And it is therefore said to be, *finalis concordia, quia finem ponit negotio, adeo ut neutra pars litigantium ab ea de cæteropossit recedere*. And it was anciently the end of a suit indeed; for after there had been some contention about the thing by suit, the parties became agreed who should have it, and so a fine was levied of it, and there was an end of the matter; and hence it is said to be *fructus* or *effectus legis*, \* because it gives a man the fruit or effect of his suit. And to this day, therefore, a writ doth always go forth before a fine can be levied; and this is now one of the common assurances of the kingdom (3).

Conusee or  
recognisee,  
conusor or  
recognisor.  
Deforçant.

\* P. 3.

The parts  
of it.

King's  
silver, *quid*.

There are five essential parts of a fine. First, the original writ taken out against the conusor, for without this a fine cannot be levied. Secondly, the King's licence for the levying of the fine, and for this the King is to have a fine or sum of money, which is called king's silver, for this is properly that money which is due to the King in the court of Common Pleas, in respect of a licence there granted to any man for passing a fine; and this is part of the revenues of the Crown (4). Thirdly, the conusance or concord itself, which

Terms of  
the law, tit.  
Fine. Co.  
Lit. 126,  
127, 120.  
Plew. 357.  
West. Symb.  
par. 2  
ch. p. 1.

F N.  
a.  
Co.

West.  
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19. D.  
216. l.  
265. S.  
4. H. 7.  
24. l.  
ch. 7.  
3. 86.  
32. H.  
chap.

(2 Co. I.  
a Inst.

Co. 7. 3

(1) It is a *feoffment on record*, whereby a freehold may pass by the common law without any livery of seisin. Co. Lit. 60.—In *Hunt v. Bourne*, 1 Salk. 339. the court of K. B. denied a fine to be a feoffment of record, and said it was improperly so called, but that the meaning was—"that it had the effect of a feoffment to some purposes, if he that levied the fine was seised of the freehold at the time of the fine levied."—In *Smith*, on the demise of *Dormer*, v. *Packhurst*, lord chief justice *Willes*, in delivering the opinion of the judges, opposes the determinations of lord chief justice *Holt* and lord *Macclesfield* to the authority of lord *Coke*, with respect to his definition of a fine. See 3 Atk. 141.—According to Mr. Justice *Blackstone* (in 2d volume of his Commentaries, 348.) a fine may with more accuracy be called an *acknowledgment of a feoffment on record*.

(2) *Deforcement* may be grounded on the nonperformance of a covenant real, and therefore in levying a fine of lands, the person against whom the fictitious action is brought, upon a supposed breach of covenant, is called the *deforçant*. 3 Bl. Comm. 174.

(3) See further as to the nature of a fine. *Spel. Gl. ff.* 228. 1 Wood. 531. *Wils.* 2.

(4) The quantum of the fines ascertained, and the reason why they are payable to the King, in a *Inst.* 511.

(1) W.  
s. Med.  
in the l.  
nor King  
nity term  
(2) W.  
chirograph  
the latter  
parts of  
(3) An  
9. d. Vin



is the very agreement between the parties that intend the levying Concord, of the fine, how and in what manner the thing shall pass, and *quid*.

doth begin thus: *Et est concordia talis, &c.* and this is the foundation or substance of the fine; for if upon this the King's silver be entered, albeit the conusor die afterwards, yet the fine is good, and the note or foot of the fine are but abstracts out of this (1).

Fourthly, the note of the fine, which is an abstract of the original contract or concord, and doth begin thus, *Inter A querentem & B & C. desorcientes, &c.* Fifthly, the foot of the fine, which doth begin thus, *Hæc est finalis concordia, &c.* and containeth all the matter, the day, year, and place, and before what Justices it was levied, which is therefore called the foot of the fine, because it is

Note of the fine, *quid*.

Foot of the fine, *quid*.

Engrossing of the fine, *quid*.

*Quotuplex.*

F.N.B. 147.

a.

Co. 5. 39.

West. Symb.

part 2. Sect.

19. Dyer

216. Plowd.

264. Stat.

4. H. 7. chap.

24. 1 R. 3.

ch. 7. Co.

3. 86. Stat.

32. H. 8.

chap. 36.

the last part of it, and when this is done, all is done. And of this there are indentures made by the Chirographer, and delivered to the party to whom the conuſance is made, which is called the engrossing of a fine, for then a fine is said to be engrossed, when the Chirographer makes the indentures of the fine, and doth deliver them to the party to whom the conuſance is made (2).

A fine is either without proclamations, which is also called a fine at the common law, and this is such a fine as is levied after such manner and form as fines were usually levied before 4 H. 7. upon which no proclamations were made, which fine doth still remain of the same force as it was at the common law to discontinue the estate of the cognisor if it be executed. Or it is with proclamations, which is also called a fine according to the statute, and which is such a fine as is levied with proclamations after the form and manner ordained by the statute of 4 H. 7. c. 24. (and such a fine shall every fine that is pleaded be intended to be if it be not shewed what fine it is) and of this sort were and are most fines since 4 H. 7. as being the best kind of fine of all; and it is in the election of him that sueth out the fine, as long as he liveth, to

(2) Co. Read.

2 Inst. 513.)

have it with, or without, proclamations. A fine also, whether with or without proclamations, is either executed, which is such a fine as of his own force giveth a present possession (or at the least in law) unto the cognisee, so \* that he needeth no writ of *Habeere facias seisinam*, or other means for the execution thereof, but he may enter; of which sort is a fine *sur cognissance de droit come ceo que il ad de son done*, which is in very deed the best and surest kind of fine of all, and is thus, *et est concordia talis, scilicet quod predictus A recognoverit tenementa predicta cum pertinentiis esse ius ipsius B. ut illi que idem B. habet de dono predicti A. & illi remissit, &c.* and this kind of fine doth always suppose a feoffment, or gift precedent of the same thing whereof the fine is had, which the fine is to corroborate and strengthen (3): or it is executory, which is such a fine as of his own force doth not execute the possession in the cognisee, and of this sort is a fine *sur cognissance de droit tantum*, when the party that doth levy the fine is seised

or of his heirs after his decease  
3 Inst. 80. b  
Co. 26. 69e

\* P. 4.

Co. 7. 32.

(1) If the King's silver is not entered before the conusor's death, the fine may be reversed for error. *Med.* 140—but in 2 *Ld. Raym.* 850. If a fine be acknowledged before Commissioners in the country in the long vacation, and before the next term the conusor dies; though no writ of covenant was sued, nor King's silver entered; yet the Common Pleas will permit the conusee to enter the fine as of the Trinity term preceding. See further, *Vin. Abr.* Fine, (F. b. 6.)

(2) If there is any difference between the record of the fine which remains in the possession of the chirographer, deemed the *principale recordum*, and the record which remains with the *custos brevium*, the latter shall be amended, and made according to the former—3 *Leon.* 183—See further as to the parts of a fine—*Bac. Abr.* Fine, (A.) *Vin. Abr.* Fine, (M. b. 2.)—*Com. Dig.* Fine, (E.)—1 *Co. Real.*

(3) And in respect of the bighth of this fine, a fee simple may pass without the word *heirs*. *Co. Lit.* 9. b. *Vin. Ab.* Fine, (N. b. 3.) *per* 19.

of the thing, and he to whom the fine is levied hath no freehold therein, but it passeth by the fine (1): And a fine *sur done, grant, release, ou confirmation*, which is after this manner. *Et est concordia talis, sc. quod prædict' A. concessit et reddidit tenementa prædicta cum pertin' præfat' B. et hæred' suis durante vita ipsius A. Et prædict' A. warrant' præd' cum pertin' præfat' B. & hæred' suis tota vita ipsius A.* Or thus, *Et est, &c. quod præd' A. concessit præd' B. tenementa, &c. Habend' eidem B. pro termino vitæ suæ.* Or thus, *Et est, &c. quod præd' A. recognoverit tenementa prædict' cum pertin' esse jus ipsius B. & ille ei reddidit in eadem curia habend', &c.* Or a fine *sur Done, ou Grant et Render*, which is thus, *Et est concordia talis, sc. quod prædict' A. recognoverit, &c. ut ill' quæ idem B. habet de dono prædict' A. et ill' remisit, &c. et pro hac prædict' B. concessit tenementa prædict' cum pertin' præfat' A. et ill' ei reddidit in eadem Curia habendum et tenend', &c.* And if these kind of fines be not levied, or such render made unto them that be in possession at the time of the fines levied, the cognisees must enter or have writs of *Habere facias seisinam*, according to their several cases, for the obtaining of their possessions. But if at the time of levying of such an executory fine, the party unto whom the estate is limited be in possession of the lands passed, he shall not need any writ of execution to put him in possession, for then the fine will enure by way of extinguishment of right, and doth not alter the estate or possession of the cognisee, however perchance it doth better it (2). The fine *sur consueance de droit tantum* also doth serve sometimes to make a surrender, and then it is therein recited, that the conusor hath an estate for life, and the conusee the reversion: and sometimes it doth serve to grant a reversion (3), and then the particular estate is recited to be in another, and that the conusor willeth that the other shall have the reversion, or that the land shall remain to the other, after the particular estate spent. A fine also is either single, which is such a fine by which an estate is granted to the cognisee, and nothing granted or rendered back again to the cognisor by the cognisee: or it is double, which is such a fine as doth contain a grant, and render back again either of the land \* itself, or of some rent, common or other thing out of it to the cognisor for some estate, limiting thereby many times remainders to strangers which be not named in the writ of covenant, which also is sometimes with reservation of rent, clause of distress, and grant of the same over (4).

Vide infra.

\* P. 5.

4. The manner and order of levying of a fine.

The manner and order of suing out or levying of a fine is thus *Experienta*. (5). First, there is an original writ sued out, and this may be a writ of *Mesne, Warrantia carta, de consuetudinibus et servitiis*, or any writ of right, (for upon these or any other writ whereby land is demanded or may be recovered, a fine may be levied); but *ut supra*. the most usual writ whereupon a fine is levied is a writ of cove-

(1) And vests in the conusee before entry, *Co. Lit.* 266. b. This fine, being *sur consueance de droit*, also conveys a fee-simple, without the word *heirs*, 6 *Co. Read.* 7.

(2) Since the statute of uses 27 H. 8. writs of possession are never sued out where fines are levied to uses; for the statute executing the possession to the use, the cognizee is immediately in possession without attornment: and by the 4 & 5 Ann. c. 16. attornment after a fine is become unnecessary. *Booth* 250.—

*Fig. 49.*—See also the excellent *essay on fines* (lately published by Mr. Cruise, of Lincoln's Inn) p. 38.—

(3) For of a reversion there can be no feoffment or donation with livery supposed, as the possession, during the particular estate, belongs to a third person. *Moor* 629.

(4) See further, as to the different kinds of fines. *West. Symb. part 2. §. 19. Vin. Abr. Fine, (N. b.)*

(5) The curious reader will find the ancient manner of levying a fine in *Glan. l. 8. c. 2, 3.*

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writ where the  
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or life.

Rep. 68. a

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nant; and whiles this writ is depending, (for howsoever it be the common practice to take out a *Dedimus potestatem*, and have the conuſance of a fine before any original writ be ſued forth, yet the original writ is always ſuppoſed in law to precede the *Dedimus potestatem*, and therefore doth and muſt evermore bear *Teſte* before it (1), or elſe it is erroneous) after the original writ ſued forth, there is a *Precipe*, which is the tituling of the writ whereupon the fine is levied, and the concord and agreement of the parties, both which are fairly written, and that moſt commonly in parchment: after this, the party or parties that is or are to acknowledge and levy the fine, is or are to come in perſon before him or them that have power to take the ſame conuſance, who are to take notice of the perſons, that if there be any woman that hath a huſband amongſt the conuſors in the fine, they do examine her whether ſhe be willing and do it freely without compulſion of her huſband (2). After this, all the parties that are to levy the fine are to declare themſelves before the Judges or Commiſſioners, having power to take the ſame conuſance, to be willing to paſs their right in the lands according to the agreement, and to ſubſcribe their names or marks to the concord: and if it be taken by a ſpecial *Dedimus potestatem*, it is to be returned and certified under the hands and ſeals of the Commiſſioners into the Court of Common Pleas, that it may be there recorded and finiſhed. And there the party conuſee is firſt to compound with the King for his liſenſe, for which he is to pay the King's ſilver, and thereof he is to have an entry on the back of his writ of covenant (3), and then he is to have it enrolled by the *Cuſtos breuium*, and upon this roll the proclamations are to be endorſed, after this, it is to be brought to the Chirographer, who is firſt to make that note thereof that is called the note of the fine (4): and hereupon if it be a remainder, reversion, rent or ſeignory whereof the fine is levied, the writ of *Quid juris clamat, per quæ ſervitia, quem redditum reddit*, as the caſe requireth, muſt be ſued forth (5). And after this, the Chirographer is to enter the fine of record, to engroſs it, and to make and to deliver the indentures thereof unto the conuſee (6); and if it be a fine with proclamations, it is \* to be proclaimed \* P. 6. openly in the Court of Common Pleas once every one of the four terms next after the engroſſing of it, (and it was to be proclaimed within the county where the land did lie at every aſſiſes and feſſions the next year after the engroſſing of it, but this it ſeems is not neceſſary now) and the next term after the engroſſing of it the contents thereof are to be recorded in a table, made for that purpoſe, to be ſet up in the Court of Common Pleas at *Weſtmiſter* in an open place all the term time; and ſo alſo at every aſſiſes, the fine may alſo be enrolled and exemplified.

(1) Accordingly *Cro. Eliz.* 740. *Goburn v. Wright*; but it ſeems, if the writ of covenant and *de. p.* both bear date on the ſame day, it is not error, *Arundel v. Arundel*, *ibid.* 677.—Note, in the ſeveral Editions of *Cro. Eliz.* the number of the pages from 457 to 472 is repeated.—*S. P. Herbert v. Binion*. *Rel. Rep.* 223.

(2) In what caſes a feme covert ſhall be examined. See *Vin. Abr.* Fine, (F. M.) and *Co. Lit.* 353. a. How ſhe ſhall be examined, and when ſhe ſhall be barred, though not examined. *Chet.* 52.

(3) When a year and a day have elapſed from the acknowledgement of a fine, an affidavit muſt be made, that all thoſe who depart with any intereſt by the fine are ſtill living, otherwiſe the King's ſilver will not be received. *Barnes* 215.

(4) Which muſt be enrolled in the proper office, according to the ſtatute of 5 H. 4. c. 14.

(5) By the conuſee againſt the tenant to compel him to attorn, but by the ſtat. of 4 & 5 Ann. c. 16. §. 9. fines are good, *without attornment*; and there is no occaſion for ſuing out thoſe writs. *Wilſ.* 44.

(6) Though it is uſual to complete the indentures of the fine immediately on its being levied, yet there may be many years between the levying and engroſſing a fine. *Plow.* 366.



5. The nature, use, and fruit of a fine.

A fine is a record as of great antiquity (1), so of a high nature, great force, and much credit and esteem; and it is now become and serves for a formal conveyance of land, and one of the common assurances of the kingdom, for by this means a man may convey his land to another in fee simple, fee-tail, for life, or years, with reservation of rent also. It is therefore called a feoffment of record, for it doth countervail a feoffment with livery of seisin in the country, and it includeth all that the feoffment doth; and worketh further of his own nature, and it is indeed for many purposes the best and most excellent assurances of all others, for by the ancient Common Law it was so high a bar, and of so great force, and of so strong a nature in itself, that it did conclude and bar not only such as were parties and privies thereto and their heirs, but all others of full age, out of prison, of good memory, and within the four seas the day of the fine levied, if they did not make their claim within a year and a day (2): And it is still of that force, albeit it be somewhat enfeebled by some statutes, that either it passeth all the right and interest of the consutor to the consusee, or else it worketh by way of extinguishment and estoppel, and doth perpetually bar the consutor and his heirs of all present and future right and possibility of right or other collateral benefit to the thing whereof the fine is levied. And if it be a fine with proclamations it doth in time become a perpetual bar to all others also, that have right, except they do take care to prevent the bar by their claim, action, or entry, within five years after the proclamations ended. And it barreth entails peremptorily whether the heir do claim within five years or not, if he make his claim by him that levied the fine.

6. What shall be said a good fine, or not; and how.

1. In respect of the persons thereunto and their capacity; and by, or to whom a fine may be levied, and who may be consutors or consusees; and by what names.

\* P. 7.

*Non sane memoria.*

Persons attaint.

Infants.

Any person male or female, body sole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a consutor therein, but there are certain persons prohibited by law, which the Judges or Commissioners that take the consufance of fines ought not to admit or receive, and yet if they do admit them, and a fine be levied by such persons, the fine is good and unavoidable, *Fieri non debet, sed factum valet*: and of this sort are mad-men, lunatics (3), villaines, ideots, men that have the lethargy, doting old persons that want discretion, drunken men, and men that are forced to \* it by threatening, imprisonment or the like, also such as are born blind, deaf and dumb, but a man that becomes so accidentally may be received and ought not to be refused. Also persons attainted of felony or treason ought not to be received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the King and the Lord of whom their lands whereof the fine is levied, are held for their times (4): but persons waived or outlawed in personal actions only ought not to be refused. \*Also infants ought not to be received to levy a fine, and yet if an infant be admitted to levy a fine, and he do not avoid by writ of error during his minority (as he may if it be not a fine *Sur grant & render* in tail, or for life),

Statute of Fines. 18 E. 1. Co. 1. 3. Plow. 358. 265.

2. *West. 332.*

West. Symb. in his Tract of Fines. 17 E. 3. 5. 17 Aff. pl. 17 Litt. Sect. 731. Perk. Sec 24. Fitz. Fines 120. See in Grant infra chap. 12 Numb. 4.

\* 17 E. 3. 52. Crompt. Jur. 37. 10 E. 4. 13.

(1) Fines at the common law were frequent before the accession of *Will. the 1st.* 2 *Infr.* 511. *Fin. Abr.* Fine (A. 1, 2)——As to the origin and antiquity of fines—See the *Essay on Fines, chap. 1.*

(2) And the stat. of 18 *Ed.* 1. says, that on these accounts such solemnity is required in passing a fine. 2 *Infr.* 513.

(3) This is true strictly at law; but where a man conveyed lands by deeds, fines and recoveries, under value, and by an inquisition was found to be a lunatic, the purchase was set aside, and the purchaser only allowed the money he had actually paid. 2 *Vern.* 678.

(4) See the case of *Stevens v. Winning*, 1 *Willf. Rep.* pt. 2. p. 219.

<sup>b</sup> Perk. Sect. 19. <sup>b</sup> And if he die during his nonage, before he hath avoided it, it seems his heir can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a solemn argument, and of this *Just. Dod. in 17 Jac.* made a Quere (1). <sup>c</sup> Also women that have husbands ought not to be admitted alone without their husbands to levy fines, and yet if such a woman alone levy a fine of her own land she hath in fee simple, and her husband do not avoid it (as he may if he will) by writ of error, entry or otherwise during her life, or after her death during his own life, if he be tenant by the courtsey, this is now a good fine and will bind her and her

heirs for ever, except she be an infant at the time of the fine levied, and her husband happen to die during her minority, for then in that case, if it be not a fine *Sur Grant & Render* to her in tail or for life, she may avoid it during her minority, but if the coverture continue until her full age, in that case she cannot avoid it except her husband join with her in it; but the husband and wife ought to be received together to levy any fine of her land.

If such persons as are civilly dead, as Friars, Monks, and the like, be admitted to levy a fine, the fine is void. But such civil bodies as have absolute estate in their possessions, as Mayor and Commonalty, Dean and Chapter, Colleges, and other societies corporate, may levy fines of the lands they hold in common, even by the Common Law, and such fines are good; but ecclesiastical persons, as Bishops, Deans, Masters of Hospitals, Parsons, Vicars, Prebends, and such like, are by divers statutes restrained to levy fines of their spiritual inheritances (2).

Any person that hath capacity to take by grant, or may be a grantee by deed, may take by fine and by a conveyance therein, as any person male or female, of full age or under age, whether it be a *Feme Covert*, mad person, lunatick, idiot, any person in prison, or beyond the sea, also any person attainted of felony or treason, or outlawed in any personal action, a bastard, clerk convict, or alien, may be conveyee in a fine, and a fine levied to such persons is good. <sup>d</sup> Also corporations spiritual and temporal may be conveyees in fines, and fines \* levied to them are good; but before the engrossing of such fines there goeth always a writ to the Justices of the Common Pleas, *Quod permittant finem illum levare*. But such persons as are civilly dead, as Friars, Monks, and the like, cannot be conveyees in a fine, and therefore a fine levied to such persons is void.

The names of cognisors and cognisees in fines must be certainly set down, and they must for the most part be described by their right names of baptism and surname, whether they be King,

(1) The Law makes a distinction with respect to an infant, between *matters of record*, and *matters in fact*: the latter he may avoid either before or after he comes of full age, but, the former only during his minority; because *matters of record*, as *fines*, &c. are judicial acts and taken by a Court, or a Judge, and therefore the nonage of the party to avoid the same shall be tried *by inspection of the person of the infant by the Judge*, which cannot be done after his full age; but if on a writ of error, brought by the infant to reverse the fine for his nonage, proof thereof is made before he comes of age, and he afterwards dies before the fine is reversed, his heir may reverse it, or if he comes of full age before the reversal is complete, it may be reversed after his full age. *Co. Litt. 131. a, 380. b, Cro. Jac. 230. 2 Inst. 483.*—What is to be tried by the Court upon inspection; see *Bac. Abr. Trial, (D)*—and for the manner of reversing a fine for the nonage of the conveyer by inspection, 3 *Bl. Comm. 332.*—*Essay on Fines 75.*

(2) The *Queen* may levy fines: an *Alien* who hath purchased land cannot levy a fine if the Court perceives it, but if the fine is levied, it is good and shall never be reversed. *Denfb. R. on fines, 13.* See further who may levy fines, *Vin. Abr. Fine, (D. 10.) Brown 14. Bac. Abr. Fines, (C.)*—If any person levies a fine in the name of any other person who is not privy nor consenting thereto, and shall be lawfully convicted thereof, such person so levying the fine shall by *Stat. 21 Jac. 1. c. 26.* suffer death without benefit of clergy.

Princes, Dukes, Marquisses, Earls, Viscounts, Barons, Lords, or Knights, which be names of dignity, but some of these are sometimes described without their surname, as *Georg' Comes Salop. Johannes Dux Lancast'r.* or whether they be Esquires or Gentlemen, which be names of worship and honour. But these additions of names of dignity and honour given to such persons or any others, as Bishops and the like, are used in fines rather of courtesy than of necessity, for they are not needful in fines. But in case where there be two of one name it is safe to make some addition by way of distinction, as *senior* and *junior* and the like.

If a woman, living her first husband, take a second husband, and with him and by his name acknowledge a fine, it seems this is void because of this mistake; but if a woman with her right husband, by a wrong Christian name, levy a fine she is concluded by it, and cannot avoid it during her life. \*And yet if a fine be levied to a man and his wife by a wrong name, as to *A. and Sibill* his wife, when her name is *Isabell*, this is holden to be void. † But if a fine be levied by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it seems this fine is a good fine.

2. In respect of the persons before whom it is acknowledged, and the persons and place before whom and where it is recorded. And what persons may take consufance of fines or record them, and where, and how, and the duty of such person therein.

\* P. 9.

*Dedimus potestatem, quid.*

The persons or Judges before whom a fine is to be levied are of two sorts, for some are Judges only at the time of the cognifance, and certificate thereof, and others are Judges to whom the cognifance is to be certified, and before whom it is to be recorded. The first sort are such as have power to take such cognifance, either *ex officio*, and by virtue of their offices; or by some commission general or special granted unto them by the King out of Chancery; as all or any two of the Justices of the Common Pleas may in open Court take knowledge of fines and record them by virtue of their office (1). † Or the Chief Justice of that Court may by the prerogative of his place take cognifance of fines in any place out of the Court, and certify the same without any writ of *Dedimus potestatem* (2): † and so also as it seems may two of the Justices of that Court with the consent of the rest: or one of them with a Knight (but this is not usual at this day.) † Also Justices of assize, by the general words of their patents, may take and certify cognifances of fines without any special *Dedimus potestatem*, but at this day they do not use to certify them without a \* special writ of *Dedimus potestatem*. And fines have been levied before Justices errants.

Also cognifances of fines are taken by a special writ issuing out of the Chancery called a *Dedimus potestatem*, whereby commission is given in divers cases to a private man for the speeding of some act appertaining to a Judge upon a surmise that the parties that are to do the same are not able to travel, and by this writ upon such a surmise, power may be given to any Serjeant at law alone, or to any Knight and Gentleman together, to take the consufance of such persons, and they may by virtue thereof take the same † either of all or some of the parties; † and that, as it seems, in any place accordingly (3): † But a Justice, or other person being cog-

7 H. 4. 22.

11. pl. 11.

F. N. B.

97. a.

Litt. Broo.

Sect. 344.

West.Symb.

ubi supra.

8 Stat. 15.

E. 2. Stat.

de Carhi.

h Dyer 244.

Crompt. Jur.

1 Stat. 15.

E. B. Broo.

Fines 20.

k Dyer 224.

Broo. Fines.

120.

Crompt. Jur.

92. F. N. B.

147. a b.

146. F. G.

1 Curia 39.

& 40 El. 17.

m Dyer 220.

n H. 6. 21.

(1) By the stat. 18. Ed. I. *de modo levandi fines*, which directs fines to be levied in the Common Pleas, and not elsewhere. 2 Inst. 515.—except in a Court of ancient Demeſne. *Hunt v. Browne*, 1 Salk. 340.

(2) But the Chief Justice of England cannot, nor any other of the Justices, except the Chief Justice of the Common Pleas, who hath this special authority by custom, and not by any statute. 9 Co. Read.

(3) For the origin of the writ of *De. po.* See 2 Inst. c. 12.—for its nature and operation. *Vin. Abr.* Fine, (M. b.)—by the present practice it is sufficient if one of the Commissioners be a Knight, or though neither of them be a Knight, if one of the Judges gives his *Allocatur* to the caption, by which means great abuses are said to happen in taking of fines. *Bac. Abr.* Fines, (D.)



nisee in a fine, may not take the cognisance thereof himself. And all these that have power to take the conusances of fines are to take great heed of whom they do take the same, and whom they do admit to make such conusances before them, ° And therefore they are to see that they know the parties that are to be cognisors, that they suffer not one man to make a conusance in another man's name, and that they do not take any conusance from any person prohibited by law, for misdemeanors by such persons herein are punishable in the Star-Chamber (1). ¶ And if there be any woman that hath a husband that doth join with her husband in the conusance, the Judges or Commissioners must take care they do examine her whether she be willing, and do part with her right in the land willingly, or by compulsion of her husband, for albeit she be made to do it by compulsion of her husband, yet hath she no way to relieve her self when it is done. ¶ And after the Commissioners have taken the same cognisances by *Dedimus potestatem*, they are to certify the same truly, and the day and year when it was taken, ¶ and not another time (for this may be a misdemeanor punishable in the Star-Chamber) and to return the commission into the Court of Common Pleas under their hands and seals within a year after the taking of the same conusance, at the farthest (2). ¶ And if they refuse to return or certify it, the party grieved may by a writ called *Cognitionibus admittendis* or a *Certiorari* compel that Commissioner that hath it in his custody, or his executor or administrator if he be dead, to certify it. ¶ But if any of the cognisors happen to die before it be certified, then it cannot be certified at all, for it cannot now be made a good fine. ¶ And so also (as some hold) if the King die. ¶ But if the King's silver be entered in paper or upon the back of the writ of covenant, as the use is, and the party die after this, in this case the fine may go on, and will be a good fine notwithstanding the death of the party. *Cognitionibus admittendis, quid.*

And Judges for the recording of fines be the Justices of the Common Pleas only, and therefore all cognisances of fines must be certified thither, for in that court only, and not in any other of the Courts \* of Record at Westminster, or in other inferior \* P. 10. Courts, or ancient demesne, are fines to be levied. ¶ But by special grant a fine may be levied in a ba'e Court. ¶ And by certain acts of Parliament fines may be and are levied in the county palatine of Chester, county palatine of Lancaster, and county palatine of Durham, of lands lying within those places (3). And if any persons do take conusance of fines other than such as before that have power, or any other persons or Judges shall record fines, or they shall be levied in any other court or place than as before, such fines are void (4).

A fine may be levied of all things whereof a *Præcipe quod reddat* 3. In re-  
lieth, and of all things which are inheritable and in *esse* at the pest of the  
time of the fine levied, whether the thing be ecclesiastical and thingwhere-

(1) The court ordered the commissioners who took the conusance of a fine from an infant feme tenant in tail, with her husband, to be prosecuted by information, and the fine to be vacated, *quoad* the ferme only.—*Hutchinson's case*, 3 *Lev.* 36. See also Serjeant *Buckley's case* to the same effect in *Skinner. Rep.* 23.

(2) For the Rules made by the court of C. B. touching the certificate by the commissioners, and of the oath to be made of the acknowledgment of the fine. See *Wils.* 81 to 90. *Barnes's Notes*, tit. *Fine*, and the *Essay on Fines*, 56.

(3) In the city of *Chester* by 43 *Eliz.* c. 15;—in the county palatine of *Chester* by 2d. & 3d. *Ed.* vi. c. 28;—of *Lancaster* by 37 *H. 8.* c. 19;—of *Durham* by 5th *Eliz.* c. 27;—and in the courts of the great Justices in *Wales* by 34 and 35 *H. 8.* c. 26. §. 40.

(4) Lord Coke in his eighth reading on fines says, fine levied in *King's Bench* is not void, but voidable by writ of error.

of the fine is levied, and of what things a fine may be levied or not, and by what names.

made temporal, or temporal (1). As of an honour, manor, island, barony, castle, messuage, cottage, mill, toft, curtilage, dove-house, garden, orchard, land, meadow, pasture, wood, underwood, chapel, river, chauntry, corrody, office, fishing, warren, fair, rectory, mines, a view of frankpledge, waife, estray, felon's goods, deodands, hospital, furzes, heath, moor, rent, common, advowson, hundred, way, ferry, franchise, feignory, reversion, toll, tallage, pickage, pontage, aquitail, services, portion of tithes, oblations, or the like (2). And therefore fines *de honore de S. or de manerio de S. or de castro, or de castello de S. cum pertinent'* are good. So fines *de uno mesuagio uno cotagio, uno molenino, without aquatico or granatico annexed, are good*. So fines *de uno tofto, uno curtilag. uno columbario, uno gardino, uno pomario, decem acris terræ, decem acris prati, decem acris pasturæ, decem acris bosci, decem acris subbosci, de balliva sive officio bailivæ de D. de custod. sive officio custod. de B. de custod. parci & foreste de D. officio senescalliæ de S. cum pertinent', decem acris brueræ, decem acris moræ, decem acris juncariæ, decem acris marisci, decem acris alneti, decem acris ruscariæ, are good*. Also fines may be *de vis. fran' pleg. libertate & franchesiis, in D. wardis. maritagii, escheat catall. felonum, warrat extrabur. de catall. fugitivorum, utlagat. attinæ. de ferreis. mercat. wrecco maris, or, de rectoria ecclesiæ parochialis de M. or, de decimis granorum, garbarum & sæni eidem rectoriæ spectan' &c. or, cum omnibus decimis granorum, garbarum & sæni eidem rectoriæ spectan', or, de decimis garbarum, ad ecclesiam de M. qualitercunque spectan', or, de omnibus & omnimod' oblationibus, decimis granorum, garbarum, sæni, lanæ, lini, canabas, porcellorum, aucarum, agell. or, &c. & aliis emolumentis quibuscunque; spectan' crescent' sive existen' cum pertinent' in D. alio fines may be de cilio salium plumbarum, aquæ salcæ, puteo, or, de theolonio, stallagio, picagio, pontagio, infra burgum de D. or, de quodam corrodio unius panis, unius logenæ cervisiæ pro omnibus hominibus in D. or, de chiminio, de piscaria, or de libera warrenna, or de frankfold, de franchise, or, de nundinis de D. singulis annis ad festa de M. ibidem tenend' \* mercat' de D. quiet. sive libero passagio ultra aquam de D. or, de communia, or de pastura pro omnibus animalibus, or pro omnibus averiis, or de pastura pro decem ovibus, or pro decem bovis, equis, vaccis, porcis, spadonibus, &c. or de communia pasturæ quod prædict' M. B. habet & habere solebat pro omnibus averiis suis in centum acris terræ ipsius I. A. in D. or de advocacione ecclesiæ de D. or de advocacione tertiæ partis ecclesiæ, &c. or de rectoria de D. advocat. præcentat. donot. libera dispositione,*

(1) Or whereof a *Precipe quod faciat*, doth lie, as the writ of customs and services; or a *precipe quod permittat*, as to have a common way, &c. or a *precipe quod teneat*, as the writ of covenant to levy a fine, and the like, 2 *Inst.* 513.

(2) To these may be added *Shares in the new river water*, whereof fines are levied by the description of so much land covered with water, and when a fine and recovery of these shares are necessary, in regard the new river runs through the several counties of Hertford Middlesex, and London, there must be three several fines and recoveries. 2 *Pr. Wms.* 128.—When money is agreed to be laid out in lands to be settled in tail, a fine cannot be levied of the money, but a decree of a Court of Equity can bind it as much as a fine alone could have bound the land if it had been bought and settled, 1 *Pr. Wms.* 130—but where the estate tail is of such a nature as would require a recovery, and the remainder-man has but a chance for the estate, as the tenant in tail may happen to die before the recovery suffered, or in a vacation when a recovery cannot be suffered, a court of Equity, whose business it is to aid the intent of a party, will not, in violation of such intent, decree the payment of the money to the tenant in tail, but decree it to be laid out in a purchase of land to be settled according to the direction of the party, in order that the chance of the remainder-man may be preserved 1 *Pr. Wms.* 471, 485.—This doctrine was fully discussed, and all the cases relating to it, in the case of *Pulney* and the Earl of *Darlington*, heard before Lord Chancellor *Bathurst*, and reheard before Lord Chancellor *Thurlow* in *Michaelmas Term* 1778. See farther of what things a fine may be levied *Vin. Abr. Fine.* (B. a.)

\* *But see 20 40 Geo. 3. c. 50 and the constitution of this statute 54 Geo. 3. c. 156. 116. 156. De Hæ. Hæd. & Hæ. Jan.*

Et jure patronatus ecclesiæ de D. or de patronagio cum advocacione vicaria ecclesiæ de D. Et capell. eidem rectoriæ annex', or de tertia parte advocacionis ecclesiæ, &c. or de medietat' advocat' ecclesiæ, or de advocacione medietatis ecclesiæ, or de medietate, or de tertia parte messuagii, decem acris terræ, or the like, and these fines are good. Also a fine may be de homagio, or de feod' militis, or de uno feod' milit' in D. or de servitio unius paris calcarium deauratorum, or de servitio inveniendi hominem equitem or peditem ad eundum vel ad equitandum with the cognissee in exercitu Walliæ, &c. or de minera plumbi Et cujuscunque generis metalli, or de proficuis officii, or de proficuo molendini, or de gurgite, or cursu aquæ current'. à loco vocat' H. infra Et per terr' voc' K. ad molend. vocat. B. or de vera sive veda in D. And fines of all these and such like things are good, but a fine that is levied of a thing not certain, as de tenemento or de hereditamento, or the like, is void (1).

21 E. 3. 44.  
18 E. 4. 22.  
West.Symb.  
Ibid.

A fine may be of a rent-charge which had no being before, (2) or of a chief rent or other rent which had a being before, but not of annuity, and a rent will pass by the number of the things to be rendered, as de decem librat. decem marcat. sex denar' or quinque solid' or uno obolario. As precipe A. quod reddat B. con. Et de 4 librat' reddit. Et red. dimid' unius libræ piperis, ac reddit. unius paris chirothecarum, sagittæ barbatae unius par' calceorum, unius vomeris, 1 lib. ceræ, 1 lib. piperis, 1 lib. cumini, 1 clavi gariophylli, 1 rosæ rubræ, 1 acus Et fili, quarterii frumenti, unius quarterii bordei, 2 bracei caponum, 40 gallorum 20 gallinarium, mille ovorum et aucarum. An honor may pass by the name of a manor, or by its own proper name, as de honore de Tickbill, or de manerio de Tickbill: so other things may most of them pass by their own proper names, as de castro vicecomitatus de S. insula de D. hundred. de D. burgo de D.

19 E. 4. 9.

A manor may pass by its proper name without naming of the town or place, towns or places wherein it doth lie, as de manerio de D. cum pertinen'.

Other things may pass in fines by the same names they are granted in deeds, as de scit. ambit' et precinct' nuper monasterii de D. Scit. manerii de D. grangia de D. parco de D. præbend' de D.

26 Aff. p.  
54. 2 E. 3.  
36. 1 E. 3.  
4. 27 H. 6.  
2.

A castle or hundred may be parcel of a manor and pass by the name of the manor whereof they be parcel, and one manor may be parcel of another manor, and pass by the name of that manor, or \* a castle may pass by its own proper name, as de castello de S. \* P. 12. cum pertin' so also may a hundred pass by its own name, as de hundred de S.

West. ubi  
supra.

A view of frank-pledge and such like thing may also pass by their own names, as de vis. frank' pleg' bonorum et cattallorum, waiviorum, selon' fugiti orum, utlagat. in exigend' positorum, selon' de se, deodand. thesaur' invent' ac extrahur' cum pertinen' in M.

Plow. 169.  
171.

By the name of a messuage may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, a mill as parcel of the same. The like of a cottage, a toft, a chamber, a cellar, &c.

(1) Or at least voidable by writ of error, for the uncertainty of the words; the proper words to express a tenement in a fine, being messuagium, and therefore a fine levied de uno messuagio, will be good, Brown 23.

(2) Accordingly Wood's Inst. 242.—sed contr. Densb. R. on fines 14.



Yet these may pass by their own single names also, as *de uno messuagio, uno curtillagio, &c.*

A chappel or an hospital must be demanded in a fine, and may <sup>13</sup> Aff. pl. 2. pass by the name of a messuage.

A reversion of land may pass by the name of a reversion, or by <sup>43</sup> E. 3. B. 1. the name of the land it self.

A foldage may pass by the name of *De libertate unius faldagii* West. ubi et cursu ovium cum pertinen' in F. or *de libero faldagio ovium* supra. cum pertinen' in F. or *de libera faldia*.

Land, meadow, or pasture, wood and the like, may pass by a <sup>16</sup> Aff. 9. certain number of acres (1), or by the certain measure of the superficial quantity thereof, as *de bida, carucata, bovata, virgata, acra, roda, furlingo terræ*: house-boot, hay-boot, and plow-boot may pass by the name of estovers, as *de rationabili estoverio in boscis, viz. in decem acris bosci ipsius A* in D. And a fishing may pass by the name of *separali piscar' in aqua de S.* West Symb. ubi supra.

And high-wood and underwood may pass by the name of wood, as *de 20 acris bosci, &c.*

Parsonages, rectories, advowsons, vicarages, or tithes impropriate pass not by the names *de advocacione ecclesiæ* but *de rectoria ecclesiæ de S. cum pertinen'*. But when the fine is but of a presentation to a church only, it must be *de advocacione ecclesiæ de S.* and not *cum pertinen'*, and of all vicarages endowed the writ must be *de advocacione vicariæ ecclesiæ de S.* and not *cum pertinen'* and where no vicarage is endowed, it must pass under these words, *de advocacione ecclesiæ de S. &c.* West Symb. ubi supra.

If part of an entire thing pass, it must pass by these words, *de medietate, tertia parte, quarta parte, &c.* as the case is, as *de duabus partibus in tres partes dividend. S. acr. terræ, or de medietate omnium decimarum, granorum et fæni de ter' vocat' le Blacklands cum pertinen. in H.* But if an entire thing as a manor or messuage be parted, as if the manor of S. be divided into two parts, (if the division be so made that the manor of that part be not extinct) and a fine be to be levied of a part of it, it must pass by the name of the whole, as *de manerio de S.* So if a messuage and 23 acres be parted, the part divided shall pass by the name of one messuage and ten acres of \* land, and not by the name *de medietate unius messuagii & viginti acr' ter'*. And if things be otherwise named than as before, sometimes the fine will thereby lose its force in all, and sometimes in part: But if a thing be twice named in a writ of covenant, as a manor, and a hundred parcel of the same, this will not hurt the fine.

The things that do pass by the fine must be named to lie in the shire, town, parish, or hamlet, where it doth lie, for a fine is good, albeit it name the lands to lie in the hamlet, or in a town decayed; but it is good to name the town wherein the hamlet is, and that with addition for distinction if there be divers towns of the same name in that county. And if a manor extend into divers towns, as into A. B. and C. it is good to express all or none, as *de Manerio de S. in A. B. and C.* For if any of the towns be omitted, none of the manor in that town will pass, but if the fine be of the manor of S. cum pertinen' and say not where it lieth, this fine will carry the whole manor. And if there be divers manors of one name as South S. and North S. or the like, it is safe to set down in the writ for the fine which manor is intended to be passed, howsoever the fine may be good of the manor intended to be passed without the distinction (2).

(1) Where a fine is levied of so many acres of land, the acres are to be considered as customary acres, and not acres according to the Statute. *Waddey v. Newton*, 8 Mod. 276. 6 Rep. c. 2.

(2) See further by what names and descriptions things will pass in fines, *Vin. Abr. Fine (C. a.)—Essay on Fine*, 91.

any part not exceeding a moiety may pass under the name of a moiety.

7 H. 6. 39.  
Plow. 163.  
Regist. 2.

The order of placing things in fines is, First, to set down the most worthy things before things less worthy, as a manor before a messuage, a castle before a manor, a house before land, arable land before meadow, meadow before pasture, &c. Secondly, to set down things general before things special; as land being the *Genus* of Meadow, pasture, wood, &c. before them; wood being the *Genus* to wood-grounds, as *alnetum*, *salicetum*, before them. Thirdly, to set down entire things before parts of things, as *de manerio de S. & medietate manerii de B.* Fourthly, to set down particular things after this manner;—

*suagium, tum, lendinum, umbare, dinum, ra, tum, tura, cus, ra*  
*Mej, Tof, Mo, Col, Gar, Ter, Pra, Pas, Bos, Brue, Mora,*  
*ria, cus, tum, caria, ditus;*  
*Junca, Maris, Alne, Ruf, Red, Seclare, priora (1).*

And yet if this order be not observed, but the things be otherwise placed in the writ, if it be suffered to pass, the fine will be good enough.

Stat. 27. E. 1.  
ch. 1. 41 E. 3.  
14. 44 E. 3.  
36. 39 E. 3.  
16. 17 E. 3.  
62. 24 E. 3.  
26.

If either the cognitor or cognisee, at the time of the fine levied, be seised of any estate of freehold in fee simple, fee tail, or for life, in possession, reversion, or remainder, whether the same be by right or wrong, the fine will be a good fine in this respect (2).

4. In respect of the estate of the parties thereunto.

62. 24 E. 3.  
26.

And therefore if one that is seised of land in fee simple, or fee tail, general or special, levy a fine of this land to a stranger, this is a good fine. So if a stranger levy a fine to him of this land, this is a good fine. So also a fine, levied by, or to, a tenant for life of the land he doth so \* hold, is good in this respect: but he must take heed of a forfeiture in this case; for if tenant for life levy a fine *sur cognisance de droit come ceo*, &c. to a stranger, or levy a fine *sur grant & release* to a stranger, to hold to the cognisee for a longer time than for the life of the tenant for life, howsoever in this case the fine be a good fine, yet this is a forfeiture of the estate of the tenant for life, whereof he in reversion or remainder may take present advantage (3). And yet if such a tenant for life levy a fine *sur grant & release*, to hold to the cognisee for the life of the tenant for life; or grant his estate by such a fine to him in reversion or remainder; or by fine grant a rent out of the land for longer time than for his own life; in these cases the fine is good, and there is no forfeiture of the estate of the tenant for life. So likewise if a fine be levied to a tenant for life by a stranger, who doth thereby acknowledge all his right to be in the tenant for life, and release and quit claim to him and his heirs, and go no further, this is a good fine, and no forfeiture of the estate of the tenant for life; for his estate is not changed thereby, and it may enure to him in reversion; but if the stranger say further in the fine *come ceo que il ad de son done*, this is a forfeiture (4).

\* Page 14.  
Forfeiture.

1 H. 7. 22.  
Co. 2. 56.  
9. 106.

(1) These two Monkish rhyming verses appear to be intended to assist the memory.

(2) See accordingly 3 Co. 90.—A fine be *cestui que trust*, upon a consideration, will bar and transfer a trust estate as effectually as it will a legal estate, 1 Chan. Ca. 49.—and it is said that such a fine with proclamations, and five years nonclaim, will bar the remainder of a trust estate, 1 Vern. 226.

(3) But he is not bound to do so, and therefore the law gives him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate, *per* Ld. Hardwicke, 2 Vesf. 482.—See also *Whaley and Tankard*, 2 Lev. 52.

(4) So as to intitle a remainder-man to enter, if the tenant for life accepts the fine; and yet it does not displace or devert the remainder or reversion.—See *Fearne's* learned and useful Essay on Contingent Remainders, 3d edit. 247. & 274.

But

Estoppel.

But if neither the cognisor nor cognisee be seised of any estate of freehold in possession or reversion, of the lands whereof the fine is levied, at the time of the levying of the same, but have only a lease for years, or not so much, the fine is void and of no force as to any stranger, howsoever it may be good between the parties by way of estoppel (1). And therefore if a lessee for years, or a disseisee, or one that hath right only to a remainder or reversion, levy a fine to a stranger that hath nothing in the land, this fine is void, or at least voidable as to and by any stranger thereunto; and he that hath cause may shew that the freehold estate and seisin of the land was in another before and at the time of the fine levied; and that *Partes finis nihil habuerunt tempore levationis finis*; and by this avoid it. And yet a vouchee after he hath entered into the warranty may levy a fine unto the demandant, but not to a stranger. And a disseisor may levy a fine to a stranger that hath nothing in the land, and this is a good fine; for he hath the fee simple by wrong in him. Also the issue in tail may be barred by way of estoppel, by a fine levied by ancestor being tenant in tail; albeit neither consor nor consuee have any estate of freehold in the land (2). <sup>a</sup> A joint-tenant, tenant in common, or coparcener, may levy a fine of his part to a stranger, and this will be a good fine (3). And so also, as it seems, may one coparcener, or tenant in common, to another.

One single member of a corporation aggregate of many cannot levy a fine of the lands of the corporation; as a mayor, or the master of a college, cannot levy a fine without the commonalty, or his fellows, &c. But such persons may levy fines of the lands they are solely seised of in their own right, as other men may do.

\* P. 15.

\* Such as have estates of freehold in ecclesiastical lands in the right of their churches, houses, &c. as Bishops, Deans and Chapters, Prebendaries, Persons and the like, may not levy a fine of such lands; for if they do, it will not bind the successor.

He that hath an estate of fee simple in lands in the right of his wife, ought not to levy a fine thereof without her; and if he do, she and her heirs may avoid it after his death (4). Also he that hath an estate of lands given in tail by the King, or by the provision of the King, ought not to levy a fine of this land, for it is void as against the issue in tail and the King. Also he that hath an estate of lands that are prohibited to be sold by act of Parliament, ought not to levy a fine of such land. Also he that hath an estate of lands of her husband, or of any of his ancestors, assured to her for her jointure, dower, or in tail; by the means of her husband or any of his ancestors, may not levy a fine of this land, for if she grant a greater estate than for her own life, this worketh a present forfeiture (5).

5 In respect  
of the con-  
cord and  
matters

In the concords of fines some things are to be regarded in the manner and form, and some things in the matter and substance. First, when a fine is levied to divers cognisees, the right shall be limited to one of them (6). As if a fine be levied by A. to B.

(1) Accordingly 1st. *Burr.* 95. and see *Co. Lit.* 332. a. and *Weale and Lower Pelex.* 54. for the doctrine of estoppel.

(2) For a fine may be levied of a right in future, or of a possibility, and will be sufficient to bar the issue in tail, 10 *Co.* 50. a.

(3) And if there be two joint-tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion, but it is a severance of the jointure, though they continue to be in of the old use.—*Essay on Fines* 71.—6 *Mod.* 45.

(4) But if she suffers five years to pass after the death of her husband without entry or action, she and her heirs are barred, *Dyer* 72. b.

(5) See further of what estate persons may levy fines, *Vin. Abr.* Fine (D.)

(6) For if a fine be levied to two persons and their heirs, the court will refuse it, 1 *Leon. Rep.* 62.

and



and C. it shall say, *Quod prædict' A. recognoverit tenementa prædict' esse jus ipsius B. ut ill' quæ iidem B. et C. habent &c.* But the King's tenant may acknowledge the right to be in divers. Secondly, the estate shall be limited to his heirs only to whom the right is limited, and not to the heirs of all the cognisees as thus, *Quod prædict' A. cognoverit ten' præd' &c. esse jus ipsius B. ut ill' quæ iidem B. & C. habent de dono prædict' A. & ill' remisit & quiet' clam' de se & hæred' suis præfat' B. et C. et hæred' ipsius B. &c.* The release and warranty must be from the heirs of one of the cognisors, where there be more than one; for in a fine from divers the fee is supposed to be in one only, and therefore it must be thus; *Quod prædict' A. & B. cogn' &c. & ill' remis' &c. de se & hæred' ipsius A. &c. Et iidem A. et B. concesserunt pro se et hæred' ipsius A. quod ipsi xar' tenementa &c, contra se et hæredes ipsius A. in perpetuum.* But if the fine be of lands in gavel-kind *contra* (1). Fourthly the concord need not to rehearse all the special names of the things contained in the writ, but it is sufficient to say, *Tenementa prædicta*, as *quod prædict' A. recognoverit tenementa prædicta, &c.* Fifthly, as a concord cannot be without an original writ, so it must pursue the original writ, and cannot be of any foreign thing, *i. e.* such a thing as is not contained in the writ, except it be consequent thereunto, as when the writ is of land, there may be in the concord of a rent out of this land; but there may be more things in the *Precipe* than are named in the concord. A concord may be with an exception of some part; but this exception must always be of such things whereof the writ will lie and are mentioned therein, \* must be \* P. 16. certainly named, and must succeed the things out of which they be excepted, as *precipe A. B. quod teneat C. D. convenc' &c. de manerio de D. cum pertinen' in C. (except' uno messuagio, duabus acris terræ, et advocacione Ecclesiæ de C. &c.) Et est concordia, &c. quod præd' A. cogn' tenementa prædict' cum pertinen' (except' præexcept).* And in all these and such like cases, as before, where the concord is not formal, the judges ought not to receive the fine nor suffer it to pass; but if they do. and the fine be finished, it cannot afterwards be avoided by writ or error, or otherwise, for these faults (2).

See in West Symb. divers examples. Perk sect. 629. Broo. Fines 108. The concord and agreement may be made of an estate in fee simple, fee tail, for life, or for years; it may be also of divers remainders, and that to them that are no parties but strangers to the fine. It may be also single or double, with a render back again of some estate in the same land, or some rent out of it; so as a concord may have in it a reservation of rent, a clause of distress, or *nomine penæ*, and a warranty. <sup>b</sup> And therefore if A. levy a fine to B. *sur cognisance de droit come ceo &c.* And B. by the same concord do grant and render the land back again to A. for life without impeachment of waste, the remainder to C. the wife of A. for her life, the remainder to A. and his heirs, this is a good concord; and by this devise a jointure may be and is oftentimes made to a woman. And if a man would have a lease for life or years made of land by fine, the lessee must by the concord acknowledged the lands to be the right of the lessor (who is seised of the land) as that, &c. And then the lessor must grant

Jointure.  
Lease.

(1) Accordingly a fine levied by three, with warranty for the heirs of them all, admitted by the court; because the land was gavelkind, and the consors heirs by the custom, *Robinson on Gavelkind* 132.

(2) For various precedents of precipes and concords, see *Brown* 26.—*Wilf.* 101, to 139.—*Nad. Form. Angl.* 217 to 237.—and for the nature and antiquity of concords, see *Nad. Form. Angl.* Distert. p. 13.

and render the same land back again to the lessor (the conusor in the fine) for life, or for a certain number of years, as the agreement is, reserving a rent with clause of distress; and this is a good fine, and a common devise for this purpose. But if the lessor be tenant in tail, it seems this fine will not bind the issue in tail (1). And yet if *A.* tenant in tail, and *N.* do by fine acknowledge the land to be the right of a stranger, *as that, &c.* and then the stranger that is cognisee, doth grant and render the land again to *N.* for life or years, with clause of distress, &c. and then grant and render the reversion to the tenant in tail, this is a good fine, and will bar the issue in tail also, and will likewise pass the rent and the reversion to the tenant in tail. So if a stranger that hath nothing in the land levy a fine *sur cognisance de droit come ceo que il ad &c.* to him in remainder in tail depending upon an estate for life, and the cognisee by the same fine render to the cognisor for ten years to begin at Michaelmas following and dieth, and all the proclamations are made after his death, and the tenant for life dieth after the time the lease is to begin; this is a good fine, and so a good lease to bar the issue in tail.

If *A. B.* and *C.* levy a fine to *D.* and *D.* render the land back again to *A.* for life, the remainder to *B.* in tail, the remainder to *C.* \* in tail, and the remainder to a stranger in fee, this or any such like concord as this, is good (2), And if *A.* and *B.* join in a fine of a messuage to *C.* and *D.* and to the heirs of *C.* who do grant and render a charge of 30*l.* out of the land to *A.* for his life, to begin after the death of *B.* to be paid at the feasts of, &c. *Proviso semper quod pred' concessio pred' annualis reddit' 30*l.* non aliqualis' se extendat ad onerand' personas dict' C. & D. sed tantummodo ad onerand' dict' mesuag' tota vita ipsius A.* then they grant and render the messuage to *A.* during the life of *H.* the remainder to *B.* in tail, the remainder to the right heirs of *B.* this is a good fine. But in such a fine *sur grant & render*, these things must be heeded: 1. None may take the first estate by the concord, but the cognisors or one of them. And therefore if *A.* acknowledge a fine to *B.* and *B.* render and grant the land to *A. habendum sibi & E. uxori ejus* and the heirs of their bodies; or if the husband levy a fine of his wife's land, and the cognisee grant and render the land to the husband and wife, this is not a good concord. 2. The render of the rent must be to one of the parties to the fine, and not to a stranger. 3. A man cannot reserve a less estate to himself than a fee; and therefore if *A.* acknowledge a fine to *B.* and *B.* render to *A.* in tail, the remainder to himself for life, this remainder is void. So if *A.* by fine acknowledge lands to *B.* and *B.* grant and render the land to the conusor in tail, the remainder to *B.* in tail, the remainder to *B.* in fee, the limitation of this estate in tail to *B.* is void, and he can never have execution of it. So if *A.* acknowledge the lands to *B.* and *B.* doth grant and render to *A.* for life. 4. The agreement must be possible and sensible, for if there be three conusors in a fine, and the conusor render to one of them for life or years a rent, and grant the reversion to another of them for life or years rendering a rent, and grant the reversion

(1) Unless executed in the life of the tenant in tail, see *Chet.* 8, and 27.

(2) The estate, made by the render, cannot be made to a stranger to the fine in the first instance; but if it be made to a party to the fine in the first instance, it may be afterwards limited to a stranger by way of remainder, 2 *Inst.* 514.—*Wils.* 64.

5] 44 Ed. in fee or in tail to the third, this is not a good concord. 5. There  
 3. 22. 27 H. can be no condition or clause of re-entry for non-payment of rent  
 8. 24. inserted into the concord, and yet some hold a fine levied to one  
 \* Co. 3. 5. in tail upon a condition, with a remainder over, is good. (\*) And  
 super Lit. such concords as these, of the last sort before, ought not to be re-  
 353. 5. 38. ceived, and if they be received, the fine in most cases may be  
 avoided for these faults, but if a fine be received with a condition  
 inserted into the concord, this is a good fine, and not avoidable by  
 writ of error, or otherwise.

Plow. 248. No single fine can be with a remainder over to any other person  
 contained in it, but it must be to the conusee and his heirs only.

2] 50 E. 3. 2. No rent can be reserved upon a fine that is *sur consueance de*  
 9. *droit come ceo, &c.* but upon a fine *sur grant & render*, or *sur*  
*concessit* only, for if one levy a fine *sur consueance, &c.* rendering  
 3] Co. 5. 38. rent, this reservation is void. 3. No single or double fine shall be  
 received with any covenants or other agreements than are before  
 mentioned, \* but in all these cases also when the fine is received \* P. 18.  
 and levied it seems it is good and unavoidable, and that only the  
 remainder in the first case, the rent in the second, and the cove-  
 nants in the last, are void, and the fine good for the residue.

44 Ed. 3. 36. A particular tenant, as for life, &c. cannot surrender his term  
 to him in reversion or remainder by fine, but he may grant and re-  
 lease it to him by fine.

44 Ed. 3. 45. One may grant his tenements which *H.* doth hold for life, and  
 which after the death of *H.* ought to remain to him, to *H.* for  
 life, rendering rent with clause of distress, saving the reversion,  
 and a fine of this form is good.

44 Ed. 3. 11. The manors and tenements contained in the writ may be divid-  
 45 Ed. 3. 12. ed, as if a fine be levied between *A.* and *B.* of two manors, and  
*B.* doth acknowledge all his right of the said two manors to be the  
 right of the said *A.* as that which, &c. for which *A.* doth grant  
 and render one manor to *B.* for life, with two parts of the other  
 manor which *N.* holdeth in dower, to have the one manor and two  
 parts of the other manor to *B.* for life, the remainder after his  
 death to *A.* in tail, and that after the death of *N.* the third part shall  
 remain to another. So if a fine be levied of the manor of *G.* with  
 the appurtenances by *A.* unto *C.* which *A.* acknowledgeth the right  
 in *C.* as that, &c. and *C.* granteth and rendereth the same to *A.* in  
 tail, the remainder of the fourth part of the manor towards the  
 west to the said *A.* and her heirs, the remainder of another fourth  
 part towards the east to *I.* in fee, and so of the other two fourth  
 parts; or uncertainly by 3. third parts in remainder to *A.* *B.* and  
*C.* in remainder severally; and these are good concords.

Co. 5. 38. If *T.* and *E.* his wife levy a fine to *R. D.* and *T. C.* of divers  
 manors and lands in *A. B.* and *C.* and in the fine there are divers  
 grants and renders, and one grant and render is of the manors of  
*A.* and *B.* and the lands therein to *T.* and *E.* and the heirs of *T.*  
 and in another render 100 acres parcel of one of the same manors  
 is granted to *E.* in tail, the remainder to the right heirs of a stran-  
 ger, notwithstanding this seeming repugnancy, the record and con-  
 sequently the whole fine is good.

See before. The fine must be levied and sueth forth in that manner  
 and order as before is set forth, for if it be not so, but that  
 there want an original writ, or if there be one, it doth bear  
*Teste* after the *Dedimus Potestatem*, or the like, it will be a de-  
 C

6. In respect  
 of the man-  
 ner and or-  
 der of levy-  
 ing it, and  
 other mat-  
 ters.

fective



festive fine and either *ipso facto* void, or at least voidable by writ of error (1).

If any one of the conufors die before the conufance be certified after it is acknowledged and taken, the fine cannot now be made a good fine, and yet if the Commissioners shall certify this conufance with an antedate, and fo the fine be finished, this may be a good fine at the common law, but perhaps may be avoided by sentence

Dyer 220.  
254. Crom.  
Jur. 92.  
Dyer 246.

\* P. 19.

in \* the Star-chamber. But if the conufance be certified and the King's Silver paid to the King before the death of the conufor, the fine may be ingrossed and finished after his death well enough, and it will be a good fine (2). And if a feme sole make a conufance of a fine, and before it be certified and ingrossed she take a husband, this will not let but the fine may be finished, and albeit it be recorded and fued out in her name as sole, whereas in truth she is covert and of another name, yet is the fine a good fine, however in this case it is not amifs to get a release of errors from her husband.

Lands that are bought of divers persons may pafs by one fine, and then the writ of covenant must be brought by all the vendees againft all the vendors, and they must every one of them warrant for himself and his heirs, and fuch a fine is good (3).

West. Sym.  
ubi fupra.

If land lye in divers shires, it may be contained in one concord, and good enough, but there must be feveral writs of covenant in every county, elfe the fine will not be good.

Dyer 227.  
15 Ed. 4. 33.

Covin.

If a fine be levied of covin by a leffee for years, or life, or a copyholder, of purpose and with an intent to bar him in reversion, or the Lord of his inheritance; this is of no force, and therefore

Co. 3. 78. 8.  
9. 105.

*non-claim* within five years will not hurt in this case: So that it feems a fine or recovery may be covinous and avoidable for covin as well as a deed, and therefore that a fine or recovery levied or suffered of fraud to deceive purchafors or creditors will be void as to them as well as any other conveyance. So alfo a fine or recovery levied or suffered in execution or purfuit of an ufurious contract may be void by the ftatutes of ufury, as well as a feoffment or other conveyance by deed. But a fine or recovery shall not be faid to be levied or suffered *per duress*, and avoided for that cause.

Co. 3. 80.  
16 H. 7. 5.  
fee infra in Deed.

Ufury.

levied or suffered in execution or purfuit of an ufurious contract may be void by the ftatutes of ufury, as well as a feoffment or other conveyance by deed. But a fine or recovery shall not be faid to be levied or suffered *per duress*, and avoided for that cause.

Durefs.

7. How the concord of a fine shall be expounded and taken.

The conufance of a fine, and a grant and render therein shall be expounded and taken as a charter or other conveyance between party and party, becaufe it is a conveyance upon record, and not as a writ or judgment upon record (4). And therefore if *A.* and *B.* by fine acknowledge the manors of *S. T.* and *W.* to be the right of *C.* and *C.* doth render the manors of *S.* and *T.* to *A.* by one render, and after by another render limit 100 acres, parcel of the manor of *S.* to *B.* this shall be a good concord, and be expounded according to the intent of the parties, *viz.* That *B.* shall have the 100 acres, and *A.* all the residue of the manor.

Co. 5. 38.  
See in expofition of Deeds infra.

(1) If there is no original writ fued out, the fine is not void, but voidable only by writ of error, *Fin. Abr.* Fine (F. 2.)—*Pleov.* 394.

(2) In the case of *Watts v. Birkett*, 1 *Wilf. Rep.* pt. 2. p. 115. The conufor died before the return of the writ of covenant, and the fine was fet aside after it had been completed, becaufe the post-fine, or King's silver due at the return of the writ of covenant and not before, became due, and was paid after the death of the conufor.—See alfo Note 1 to Page 3.

(3) And fuch joint fines feem reasonable, where the feveral purchafes are of fmall value, though they are *ex gratia*, fee *Wilf.* 47. where an order of Lord Chancellor *Hutton* is inferted, authorizing the Curfitor to flay the writ when there is more than one demandant and one deforciant, except coparceners, joint tenants and tenants in common: —but the Editor, upon inquiry at the Curfitor's office, hath been informed that two feperate purchafes are now permitted to be comprized in one fine, on an affidavit that the value of them together does not exceed 200*l.*

(4) The fine and render is a conveyance at common law, and the render makes the conufor a new purchafor as much as feoffment and re-ifeoffment at common law. *Price v. Langford*, 1 *Salk.* 337. 1 *Show. Rep.* 92.

37. H. 6. 5. If a fine be levied to two men & *hæredibus*, without the word Deed. [Suis] this is void for incertainty in a fine as it is in a deed.

Co. super. If a fine be levied *come ceo que il ad de son done*, hereby a fee-Recovery.  
Lit. 9. simple will pass without any word of heirs. And so also it is in  
Frederick case of a common recovery.

verf. Wake- If the lands be limited in the concord of a fine to B. for life, and  
field's case. after to the children of C. begotten, and C. hath at the time of  
Trin. 36 Eli. the \* fine levied two daughters only, in this case the sons and \* P. 20.  
Co. B. daughters that are born after shall take nothing by this fine. And  
no averment of intent will help in these cases. And yet an aver- Averment.  
ment lieth upon a fine of the uses thereof and of no other mat-  
ters as upon a deed.

Stat. 18. Ed. A fine at the common law, or a fine without proclamations, was 8. What per-  
1. de finibus once a perpetual bar to all persons that had right and no impedi- sons and  
Stat. 34. Ed. ment at the time of the fine levied, and that did not claim within what estates  
3. 16. Plow. a year and a day after the execution of the fine by possession; but shall be bar-  
373. Stat. 4. now this law is changed, and this kind of fine will bar none but red by a fine,  
H. 7. ch. 24. such as are parties and privies thereunto (1). But a fine by the sta- or a fine  
1 R. 3. ch. 7. tute, or a fine with proclamations, is now much of the same virtue and non-  
32 H. 8. c. 36. and force as a fine at the common law was; for by the statute of claim: and  
4 H. 7. it is provided, That every fine after the ingrossing thereof in what  
shall be proclaimed in the court the same term, and the three next time:  
following terms, four several days in every term (2), which or not; and  
proclamations so made, the fine shall conclude all parties, privies and how.  
strangers, except women covert, persons within 21 years of age,  
in prison, out of the realm, or *non sanæ memoriæ*, (being no par-  
ties to the fine) so as they, or their heirs, take their action or law-  
ful entry within five years after these imperfections removed. Sav-  
ing to all persons and their heirs (other than parties) the right claim  
and interest which they have at the time of the fine, so as they pur-  
sue it by action or entry within five years after the proclamations.  
And saving to all other persons such right, title, claim and interest,  
as first shall grow or come to them after the proclamations, by force  
of any matter before the fine, so as they make their claim or entry  
within five years after the same grow due, or if at that time there  
be any impediment as aforesaid, within five years after the impe-  
diment removed (3). And by the statute of 32 H. 8. (which is an  
exposition of this statute) it is provided, That all fines with pro-  
clamations levied according to 4 H. 7. by any person of twenty-one  
years of age, of any land, &c. before the fine levied entailed to  
him that doth levy the fine or any of his ancestors, in possession,  
reversion, remainder, or use, immediately after proclamations had,  
shall be a bar against him and his heirs, claiming only by force of  
any such entail, and against all others claiming only to the use of  
him or any heir of his body (4) By which statute it doth appear

(1) The legal signification of the word *Bar* is explained in *Co. Lit.* 372. a.—For the different meth-  
ods of making *Claim* at common law, and by whom such claim should be made, see 2 *Inst.* 518.

(2) But by the statute of 31 *Eliz. c. 2* a fine need only be proclaimed four times, *viz.* once in the  
term wherein it is ingrossed, and once in each of the three succeeding terms—see further as to pro-  
clamations, *Fyfe v. Bracket*, *Plow.* 265.

(3) If the reader is desirous of comparing the opinions of historians and lawyers concerning the statute  
of fines 4 H. 7.—he will find them in 3 *Hume's Hist.* 8vo p. 400. *Bac. Hist.* of H. 7. 43. 2 *Mortimer's*  
*Hist.* 188. 4. *Bl. Comm.* 422. and in the 13th *Edit. Co. Lit.* 121. a. *Note 1.* which also contains an explicit  
description of the nature, use, and effect of a fine, by the learned editor of that edition.

(4) Previous to the 32 H. 8. it was doubted whether a fine levied by a tenant in tail could bar the  
issue under the statute 4 H. 7. although all persons appeared to be concluded thereby under the words  
*privies and strangers* to the fine, and that doubt occasioned the enacting the statute 32 H. 8. See *Bac.*  
*Abstr. Fines*, (E.)

\* P. 21.

that all the parties to the fine, conufors and conufees, whether they be femes covert, men *de non fanæ memoriæ*, or others, infants only excepted, (who during minority may avoid it) and whether they have a natural or civil capacity; and privies, *viz.* privies in blood, as heirs, whether they be lineal or collateral, or privies in representation, as executors and administrators; and all strangers alfo, *viz.* all others befides parties and privies, that have or pretend any prefent right \* or title, (except women covert, and the reft that have impediment that do make their entry or claim, or bring their action within five years after proclamations had, and thofe perfons excepted alfo if they make not their claim &c. within five years after the impediment removed) all thefe are included. *i. e.* fo fhut and clofed up together, for their right is fo extinct hereby, as they can never open their mouths or lift up a finger againft it. Saving to all others, *i. e.* fuch as have no prefent right at the time of the fine levied, and were excepted before, fuch right, title, claim or intereft as fhall accrue to them after the proclamations upon any truft, gift in tail, or other caufe, before the fine levied, fo as they make their claim, &c. within five years after their right firft accrued if they have then no impediment, or if they have, within five years after the impediment removed (1).

For a more full underftanding of which ftatutes and this matter, thefe things in general muft firft be obferved. 1. That the perfons, to be barred by a fine are, <sup>1</sup> parties <sup>2</sup> privies. <sup>3</sup> efrangers. The parties, if they be of the age of twenty-one years, are bound for ever by the fine, and fhall have no time to claim to preferve their right (2). The privies alfo, being heirs and executors to the parties, and void of impediment at the time of the fine levied, or not, if they claim by the fame title that their anceftor had that levied the fine, are barred for ever by the fine, and fhall have no time to claim to preferve their right. <sup>a</sup> And therefore if my father <sup>a</sup> Dyer 3. diffeife my grandfather of land, and then levy a fine of the land, <sup>b</sup> Paſch. 7. and then my grandfather die, and after my father die, by this fine <sup>c</sup> Jac. B. R. I am barred of the land for ever. And here note, <sup>b</sup> that he that is <sup>b</sup> Trin 21. a privy within the intent of <sup>4</sup> H 7. is an heir within the ftatute of <sup>d</sup> Jac. Com. 32 H. 8. *Et fic e converſo*. And that privies or heirs in eftate <sup>e</sup> B. Curia in Will. Godfrey's cafe. and blood, as he that is heir to whom the land doth or ſhould deſcend, are within thefe ftatutes, and fhall be barred by the fine of their anceftor of that land. And fo alfo fhall privies in eftate that are not privies in blood, as where one hath land in Burrough Engliſh, and levies a fine of it, hereby the youngelt ſon is barred. So if one be tenant in tail to him and the heirs females of his body, and he levies a fine, having a ſon and daughter, hereby the iſſue female is barred, and yet ſhe is not the heir of his blood. But he that is privy in blood only, and not in eftate alfo, is not within thefe ftatutes, neither ſhall he be barred by the fine, and therefore if lands be given to a man, and the heirs females of his body, and he hath a ſon and a daughter, and the ſon levies a fine and dies without iſſue, this is no bar to the daughter, for howſoever ſhe be heir of his blood, yet ſhe is not the heir to the eftate, nor ſhall need to make her conveyance to it by him (3). The ſtrangers that are to be concluded by the fine, are either, 1. Such as have

(1) For the ftatutes relating to fines in order of time, the benefits intended by them, and the inconveniencies they were made to redrefs, with comments, ſee *Chet.* 21 to 49.

(2) Although they are Idiots, or *non compos.* *Co. Lit.* 247.

(3) See fully who are deemed parties and privies, and how they ſhall be barred, in 2 *Izſ.* 516. 2 *Bl. Com.* 355. *Vin. Abr.* Fines (A. 3. §. 8.)—*Bac. Abr.* Fine (E.) *peſſ.* 29.

prefent



present right and no impediment, and these are barred \* if they \* P. 22.  
make not their claim within five years after the proclamations (1).

2. Such as have present right, but have impediment of infancy, &c. and these are barred if they do not make their claim within five years after the impediment removed. 3. Such as have no present but future right upon cause precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrue; or they have impediments, and then they are barred if they claim not within five years after the impediment removed (2). 4. Such as have neither present nor future right at the time of the levying of the fine by reason of any matter before the fine, but whose right groweth either entirely after, or partly before, and partly after the fine, and these are not barred at all by the fine, but they may make their claim, &c. when they will. And parties, privies, and strangers to fines that are barred thereby, are such as have natural capacities or civil, for both these are barred. And therefore it is held, if such a corporation as hath an absolute estate and authority of his possessions so as he may maintain a writ of right thereof, as Mayor and Commonalty, Dean and Chapter, &c. levy a fine of their lands, they and their successors are barred presently; but if a Bishop, Dean, or Prebend, without assent of the Dean and Chapter, or a Person and Vicar without assent of the Patron and Ordinary had levied a fine, this would not have barred the successor; neither will it bar now with their assent, for they are restrained by divers statutes (3). So also such persons are barred by the fines that are levied by others if they make not their claim in time, as if one disseise a corporation aggregate of land belonging to their corporation, and after levies a fine of it with proclamations, and they do not make their claim, &c. within five years, hereby they are barred (4). 2. Where the ancestor is barred by the fine, there for the most part the heir is barred also. And therefore if tenant in tail be disseised, and the disseisor levies a fine with proclamations, and the tenant in tail suffer five years to pass without claim, &c. hereby he and his issues are barred for ever, so that the heir doth suffer for the laches of his ancestor. 3. The estates that shall be barred by the fine are estates by the common law, or by copyhold, in fee-simple, fee tail, or for life, or for years, the estate also of tenant by statute, elegit, and of guardians in chivalry, and of executors that have land until debts and legacies be paid (5). And therefore if one enter upon, and put out a copyholder of land, and levies a fine thereof, and the copyholder suffer five years to pass and make no claim, &c. the copyholder and his lord both are hereby barred for

Flow. 538.  
337. 375.  
378.

Co. 9. 105.

Co. 9. 104.  
5. 124.

(1) Tho' the statutes of 4 H. 7. and 32 H. 8. have made the operation of fines stronger against parties and privies than they were at common law, yet they have enlarged the privilege of strangers to avoid them, for, by those statutes, strangers have five years from the fine to make their claim where they have a present right at the time of the fine levied, and where it accrues after the fine, they have five years from the time of such accrue: whereas by the common law in both these cases they had only a year and a day from the entry of the silver at which time the land passed. *Bac. Abr. Fine (F)*.

(2) And by the 4 Ann. c. 16. §. 16. no claim or entry to avoid a fine with proclamations will be sufficient, unless within one year after such claim an action is commenced and prosecuted with effect.

(3) 1 Eliz. c. 19. — 13 Eliz. c. 10. ante, p. 7.

(4) But not their successors after their decease, for it would have been of none effect to have prohibited corporations from barring the right of their successors by conveyances made by themselves, and to have left them power by their permissions or sufferance and nonclaim to bar it, 11 Co. 78. b. And accordingly fine levied by copyholder of a dean and chapter, and five years passed without claim by him who was dean at the time, yet the fine did not bar the succeeding dean. *Ventr. 311*.

(5) Also a title of entry for a condition broken, — a power appendant or in gross, — a power of revocation, — and a writ of error, may respectively be barred by a fine. — See the Essay on fines, 147 to 151, and the cases there cited.

\* P. 23.

ever (1). And if a lease be made for years, and the lessor, or another, before entry of the lessee, levies a fine with proclamations, and the lessee doth not make his claim, &c. within five \* years, hereby the lessee is barred of his interest for ever. 4. The things where-<sup>Plow. 378.</sup> unto these statutes do extend, are lands and tenements, and not a <sup>Bro. Fines</sup> rent or other profit appender out of the land, and therefore if I <sup>123. Co. 5.</sup> have a rent, common, or estovers out of land or a way over land; <sup>124.</sup> or power to sell the land, and a fine is levied of the land itself; and I do not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. And for this cause it is, that if a tenant in ancient demesne levies a fine of his land, and five years pass, the lord is not hereby barred to avoid it, for herein he claimeth not the land but his ancient seigniori (2). 5. The time <sup>Plow. Lord</sup> in which they must make their claim, or bring their action that have <sup>Zouche's</sup> present right and no impediment is within five years after procla- <sup>case 370.</sup> mation had, and the time for them which have impediments is within five years after the impediment removed. 6. The time with- <sup>Dyer 3. Co.</sup> in which they must make their claim or bring their action whose <sup>3. 86. 91.</sup> right doth happen afterwards, if they have no impediment, is <sup>Plow. 373.</sup> within five years after the time that their right doth accrue, and if there be an impediment within five years after the impediment removed. 7. The persons whose right is saved and preserved are mentioned in the first and second saving of the statute of 4 H. 7. and they are strangers and not parties nor privies. 8. They that have benefit by the first saving of the statute shall have none by the second saving; for he that will be within the second saving to have benefit by it must be, 1. Another person. 2. The right must come and accrue to him first. 3. It must come to him after the fine and proclamations. 4. His right must be upon some cause or matter before the fine. 9. No fine shall bar any estate in possession, reversion, <sup>Co. 5. 124.</sup> or remainder, which is not devested and put to a right at the time <sup>9. 106.</sup> of the fine levied (3). And therefore if one levies a fine of my land whilst I am in possession of it, this fine will not hurt me. So if the tenant of the land, out of which I have a rent or common, &c. levies a fine of the land, this shall not bar me of my rent or common, for I am still in possession of this in the judgment of the law (4). So if there be tenant for life, the remainder for life; or tenant in tail, the remainder in tail; and the first tenant in tail, or for life, do bargain and sell the land by deed indented and inrolled, and after levies a fine to the bargainee, in this case the remainders are not barred, albeit five years pass without claim, for the law in these cases doth adjudge them always in possession (5). So if I make a lease for years of land, rendering a rent, and a stranger levies a fine of the land, and the lessee for years payeth his rent to me duly, in this case I am said to be always in possession,

(1) And the lord shall not have five years after the death of the copyholder even if he was a copyholder for life. See 9 Co. 105. b. — That copyholders are within the statutes of 4 H. 7. See Co. Comp. Cop. 126.

(2) See accordingly 1 Salk. 210. and further as to the force and effect of fines in ancient demesne, Vin. Abr. Fine (N. b. 4.) 4 Inst. 270.

(3) And he that at the time of the fine levied had not any title to enter shall not be barred, for the fine does not bar the estate but binds the right, and when the fine does not turn the estate to a right, there needs no claim. Sir T. Raym. 149. 3 Mod. 196.—but this must be understood in the case of a future interest, and not of a tenant in tail barring his issue, by Stat. 32. H. 8.

(4) See accordingly Saffin v. Adams. Cro. Jac. 60 — This principle hath also been confirmed in the case of Goodright on the dem. of Hare v. Board and Jones, determined (since the last edition of this Book) in B. R. Mich. 23d G. 3. and is stated fully in the Essay on Fines. 187.

(5) The remainder not being displaced, for the bargainee had a fee determinable upon the entry of the issue, and he in remainder has his remainder open upon default of issue of the tenant in tail. 10 Co. 96.—but if in that bargain and sale, or in a lease and release, the tenant in tail covenants to levy a fine, and levies it accordingly, the deed and fine are held to be but one conveyance or assurance by the tenant in tail in possession, and operate so as to work a discontinuance and divest the remainder—See Doe on dem. Odienne v. Whitehead. 2 Burr. 704.

and therefore am not barred by this fine of my reversion. So if there be a tenant by copy or lease for life, the remainder for life, and the first tenant for life accept of a fine of the \* land with proclamations, and five years pass without claim, &c. hereby he that is in remainder is not barred. So if one have a lease for years of land to begin in *futuro*, and the fine is levied of the land, and five years pass after the term begins, it seems this is no bar, because this estate is not put to a right. And for the further illustration of

<sup>c</sup> Stat. 4. H. 7. 32 H. 8. <sup>e</sup> If tenant in tail levy a fine of the land intailed with proclamations according to the statutes, this is a bar to the estate tail, wherein these things are to be known. 1. That wheresoever the issue doth claim by the same title, and must make his conveyance to the lands by him that levied the fine, there the fine will bar him, and therefore if lands be given to the husband and wife in special tail, *viz.* to them and to the heirs of their two bodies issuing, or the like; or the gift be to them and the heirs males or females of their two bodies; or to them and the heirs of their bodies, with the remainder to the right heirs of the husband in fee; and the husband alone levieth a fine with proclamations, by this the issue in tail is barred. And yet the right of the wife is saved so as she makes her claim, &c. within five years after her husband's death (1). <sup>d</sup> So if husband and wife tenants in special tail have issue, and the wife die, and the husband marry another wife and have issue and levy a fine *sur cognissance de droit come ceo &c.* and take back by the same fine an estate in special tail, the remainder over, &c. and die, the issue by the first wife is barred. <sup>e</sup> So if tenant in tail be disseised, or make a feoffment in fee, and after levy a fine with proclamations to the disseisor or to a stranger, the issues in tail are hereby barred for ever, the continuance of the possession in another notwithstanding. <sup>f</sup> So if a gift be made to the eldest son and the heirs of his body, the remainder to the father and the heirs of his body, and the father dyeth and the eldest son levy a fine with proclamations and dyeth without issue, this shall bar the second son for ever, for the remainder descended to the eldest. <sup>g</sup> So if lands be given to an eldest son and the heirs of the body of his father (the father being then dead) and he levy a fine of this land, this will bar the younger brother. <sup>h</sup> But if the issue in tail do not make his title by him that did levy the fine, there the fine will not bar; and therefore if my father be tenant in tail, and his brother disseise him and levy a fine, and he and my father dye, this fine shall not bar me as issue in tail, because I do not make my title to the land by him: but if I suffer five years to pass and do not make my claim, &c. by this means I may be barred by the fine. <sup>i</sup> And if the fine be levied of another thing than the thing itself entailed, as if the tenant in tail grant by fine a rent, common, or the like, out of the land entailed, this fine will not bar the issue. So if a rent be entailed and the tenant \* in tail of the rent disseise the terre-tenant of the land out of which the rent doth issue, and then levy a fine of the land, this is no bar

1. Issue in tail barred by the fine of his ancestor or some other.

<sup>d</sup> Dyer 354.

<sup>e</sup> Co. 3. 90.

<sup>f</sup> Co. super Lit 372.

<sup>g</sup> Curia Trin. 21 Jac. C. B.

<sup>h</sup> Dier 3.

<sup>i</sup> Plow. 435.

\* P. 25.

(1) Tho' the wife may enter within five years from her husband's death, and avoid the fine, and thereby become seized of an estate tail, and the remainders revested, yet the issue is barred, for altho' the whole estate tail be in the mother, yet it cannot descend from her to the issue because they were barred by the father's fine before, *Hib. 257. Moor 28.*



to the issue of the rent. 2. Albeit the fine be a double fine with a grant and render, yet it is within these statutes, and will bar the issue in tail as well as a single fine, so as the grant and render be of the land itself and not of any profit appender out of it. And therefore if husband and wife be tenants in special tail, and they levy a fine with proclamations, and the conusee grant and render the land to them and their heirs, this fine will bar the issue in tail. And if tenant in tail join with *I. S.* and levy a fine to a stranger, and the stranger doth grant and render the land again to *I. S.* for years, and to the tenant in tail in fee afterwards; the issue in tail is barred by this fine. So if there be tenant for life, the remainder in tail, and he in remainder in tail accept of a fine from a stranger, and grant and render to the stranger again for years with a remainder over, hereby the issue in tail is bound. <sup>2</sup>Co. 3. 76. <sup>85</sup>Super Lit. 353. Bro. fines. 118. Dyer 279. <sup>3</sup>Plow. 435. If tenant in tail accept of a fine of the land entailed from a stranger, and then grant and render a rent out of the land to the stranger by the same fine, this will not bind the issue in tail to pay the same rent. <sup>1</sup> If tenant in tail make a feoffment on condition, and die, having two sisters inheritable to the tail, and one of them levy a fine with proclamations *sur release* to the feoffee of the whole, in this case it is doubted whether the other sister be barred of her half or not. <sup>3</sup>Co. 3. 86. Albeit the tenant in tail dye before all the proclamations be finished, yet when they be finished, as they may be after his death, the issues in tail are bound by the fine, for howsoever by the death of the tenant in tail the right of the estate tail doth descend to the issue, yet when the proclamations are passed, this right that doth descend is bound by the statutes, and the issue cannot by any claim, &c. save the right of the estate tail that doth descend unto him. 4. Albeit the issue in tail be within age, out of the realm, under coverture, *non compos mentis*, or in prison, at the time of the fine levied and the proclamations passed, yet the estate tail is barred by the fine. And therefore if *A.* be tenant for life of land, the remainder to *B.* in tail, the reversion to *B.* and his heirs expectant, and *B.* levy a fine to *C.* and his heirs, and hath issue and dye before all the proclamations are passed, the issue in tail being then out of the realm, the proclamations are made, and after the issue in tail cometh into the realm and claimeth the remainder in tail upon the land; in this case, the estate tail is barred for ever. <sup>5</sup>Co. 3. 90. <sup>Dier. 279.</sup> <sup>Plow. 435.</sup> These statutes do extend to fines levied by tenant in tail by conclusion, and the issue shall be bound by the fine of their ancestor unto whom they are privy in estate and blood, albeit *partes fines nihil habuerunt tempore finis*. And therefore if the issue in tail be in the life of his Ancestor when he hath only a possibility, as if there be grandfather, father and son, and the grandfather be tenant in tail, and the father levy a fine of the land before the grandfather's death, and then the grandfather dye before the father, and after the father dye, in this case the issue is barred by this fine: \* <sup>Curia. Trin. 21.</sup> <sup>Jac. Com. B. Godfry and Wad's case. Dier 48.</sup> so also if the grandfather survive the father (1). But in case of a collateral descent, if the collateral ancestor die in the lifetime of his father without issue, this fine is no bar, but if he survive his father, *contra*. So if lands be given to the grandfather and his wife

\* P. 26.

(1) The issue shall be barred by his father's fine, for though he claims from the grandfather, yet he is not barred from the blood of his father. <sup>3</sup> Co. 90. b. *Hob. 333.*

in special tail, and the grandfather dieth, and the father doth disseise the grandmother, and doth levy a fine with proclamations, the grandmother dieth, and then the father dieth, in this case the son is barred. <sup>m Co. 3. 50.</sup> So if lands be conveyed in tail to a woman for her jointure within the statute of 11 H. 7. cap. 20. and whilst she liveth the issue in tail doth levy a fine of the land, by this the issues inheritable to the estate tail are barred for ever. <sup>2 Plow. 434.</sup> So if tenant in tail make a feoffment or be disseised, and after levy a fine with proclamations to a stranger, hereby his issues are barred for ever. <sup>3 Curia. 21.</sup> So if tenant in tail die, and his issue before his entry (having a freehold in law only) doth levy a fine with proclamations, this shall be a bar to his issues and to his collateral heirs and brothers of the half blood. <sup>4 Idem.</sup> So if a tenant in tail have four daughters, and one of them levy a fine in the life of the father, this will be a bar to her issue for the fourth part of the land. <sup>5 Co. 3. 50.</sup> But in these cases before and such like, where the issue in tail doth levy a fine in the life time of the tenant in tail, the tenant in tail himself may after levy a fine of the land, and thereby bar his issue, and the converse also to whom his issue hath levied a fine, and therefore in all these cases it is supposed that the tenant in tail doth die and suffer the right to descend to his issue. <sup>6 Co. 10. 50.</sup> If lands be given by will to one when he shall come to his age of twenty four years, to hold to him and the heirs of his body, and he after his age of twenty one years levy a fine of this land with proclamations, this is a bar to the issue in tail (1). If a disseisor make a gift in tail, and the donee make a feoffment to A. and after levy a fine with proclamations to B. that hath nothing in the land, this fine will bar the issues in tail; and they shall not avoid it by pleading that *partes finis nihil habuerunt* &c. But it is no bar to the disseisee, for he may avoid it by this plea when he will. <sup>7 Co. 3. 84.</sup> And *a fortiori* therefore, if a fine be levied by the tenant in tail that hath only an estate of freehold in remainder or reversion, it is good; as if A. be tenant for life, the remainder to B. in tail, and B. levy a fine, albeit this be no discontinuance, yet it is a bar to the estate tail. <sup>8 Trin. 25.</sup> But if tenant in tail have issue a son and a daughter, and the son, living the tenant in tail, levy a fine and die without issue, and then the tenant in tail dieth, by this the daughter and the estate tail is not barred. <sup>9 Jac. Co. B. Will. Godfrey versus Wade's.</sup> So if the younger son levy a fine in the life of the father, and then the tenant in tail die, this is no bar to the elder son. So if lands be given to a man and the heirs females of his body, and he hath a son and a daughter, and the son doth levy a fine of the land, this is no bar to the daughter. So if tenant in tail have a daughter, his wife being with child of a son, and the daughter levy a fine, and after the son is born, this fine shall not bar the son, for these howbeit they be privies and heirs to the blood, yet are not privies and heirs to the estate. <sup>10 Co. 3. 91.</sup> Albeit the estate, passed by the fine, be afterwards, before all the proclamations had, avoided, yet the issue in tail is barred by it. And therefore if tenant in tail discontinue in fee, and after disseise the discontinuee and levy a fine with proclamations to a stranger, and take an estate back by render in the same fine, and the discontinuee, before all

Discontinuance.

\* P. 27.

(1) See accordingly the case of *Johnson v. Gabriel* in *Cro. Eliz.* 122. and cited afterwards in the same book, p. 610, in *Hunt v. King*.

the proclamations pass, enter and claim and so avoid the fine, yet hereby the estate tail is barred. <sup>u</sup> And if tenant in tail infeof the issue in tail, and after disseise him and levy a fine, the issue enter, and after the proclamations pass, and after the issue in tail doth infeof the tenant in tail which levied the fine, and dieth, it seems this fine shall bar the issues in tail. 7. This is a bar to the estate tail and to the issues only, and is no bar to him in remainder or reversion; and therefore when the estate tail is spent, this bar is at an end. And therefore if an estate be limited to *A.* and *B.* his wife and the heirs males of the body of *A.* the remainder to *C.* and *A.* and *B.* have issue and *A.* die, and *B.* and her issue, or her issue alone levy a fine, this will bar the issues of the issues whilst there be any, but if they fail it will not bar *C.* in remainder, except he suffer five years to pass, and so be barred by his *non-claim*. So if tenant for life and he that is next in the remainder in tail, join in a fine, this is a good bar to the issues in tail for ever as long as that estate tail shall continue, but not to him that is next in remainder, nor to any other that shall come in of any remainder in tail or in fee, nor to him in reversion. <sup>\*</sup> If lands be given to *A.* and the heirs males of his body, the remainder to *B.* and the heirs males of his body, the remainder to the right heirs of *A.* and *A.* doth bargain and sell this land by deed indented and inrolled to *I. S.* and his heirs, and after levy a fine of it *sur Conusance de droit come ceo &c.* to him and his heirs, by this the remainder to *B.* is not discontinued, but it is a bar to the estate tail by the statutes, and causeth the estate of the bargainee to last so long as the tenant in tail hath issues of his body; but if the fine had been before the bargain and sale it had been a discontinuance of the remainder, but in neither case a bar to him in remainder unless <sup>\*</sup> he suffer himself to be barred by his non-claim within five years after his remainder happen to come in possession. 8. If there be tenant in tail, the remainder to him in tail, and the tenant in tail levies a fine of this land, hereby both his estates are barred (1). *Et sic de similibus.* <sup>v</sup> But all this notwithstanding, if lands be conveyed to a woman in tail for her jointure within the statute of 11 *H. 7. chap. 20.* and she levies a fine of this land, this will not bar the issues in tail (2). Or if lands be given in tail to any subject by the King's own gift or provision, and the tenant in tail levies a fine, this fine shall not bind the issues in tail nor the King, but others it will bar, for these fines are not intended within, but excepted out of the statute of 32 *H. 8.* but the King, himself, being tenant in tail of the gift of some of his ancestors being subjects, may levy a fine of it to bar his issues in tail. And in all cases where a recovery will not bar the issues in tail, there a fine will not bar them.

2. Wife barred by the land, or of the land of the husband and wife together, be a <sup>Dier. 72. Plow. 373.</sup>

(1) See further as to the operation of a fine in barring the issue in tail, *Bac. Abr. Fines, (E) Com. D. 5. Estate, (B. 22.1) (B. 25.)—Essay on Fines, chap. 10.*

(2) *A.* seized in fee, levied a fine to himself for life, remainder to his wife in tail male for her jointure, and had issue male; husband and wife levied a fine and suffered a recovery.—After the death of the husband and wife, issue male entered by force of the statute of 11 *H. 7.* and held lawful, this case is out of the letter, tho' within the remedy of the statute, for she neither levied the fine, &c. being sole, or with any after taken husband, but by herself with her husband who made the jointure. <sup>2</sup> *Co. Lit. 365.* See further *Vin. Abr. Jointress (I) (K)—Bac. Abr. Discontinuance (D)* as to what shall be deemed forfeiture within the *stat. of 11 H. 7. c. 20.* and who shall take advantage of it.

\* But see this case reversed *Sidmon v. Thompson in Jac. 8. 70*  
*Chase v. Perkins 8. T. R.*

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\* P. 28.

<sup>u</sup> Per Pop-  
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ner, Just.  
M. 39. 40.  
Eliz. B. R.  
7] *Co. 1. 76.*  
super Lit.  
372.

<sup>x</sup> *Co. 10. 96.*  
& 9 *Jac. B. R.*

8] *Co. super*  
Lit. 372.

7] *Bro.*  
Fines 121.  
*Co. 6. 55.*  
*Dier. 4. Co.*  
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perpetual bar to her and her heirs for ever, yet if the husband alone levy a fine with proclamations of such land, and then he die, in this case she is not barred of her right, but if she do not make her claim, &c. within five years after her husband's death she is barred of her right for ever notwithstanding the statute of 32 H. 8.

M. 18. (1). <sup>a</sup> And if one seised of land in fee marry a wife, and after make a lease of this land to A. for life, the remainder to B. in fee, and B. levies a fine with proclamations, and the husband dies, and the wife doth not make her claim, &c. within five years after the death of her husband, hereby she is barred of her dower for ever notwithstanding the estate for life in A. but if the remainder of B. had been put to a right at the time of the fine levied she might have avoided the fine by plea, *quod partes finis nihil habuerunt*, &c.

Dier. 224. <sup>b</sup> And if the husband levies a fine of his own land and dies, and his widow having no impediment doth not make her claim within five years after his death, hereby she is barred of her dower for ever.

Dier 358. <sup>c</sup> If a jointure be made to a woman after the coverture, and her husband and she levy a fine of it; hereby without question she is barred of her jointure in this land, but it is thought that this is no bar of her dower in the residue of the land of the husband, and especially then when the fine is *Sur consueance de droit come ceo*, &c. (2). <sup>d</sup> If lands be given to a man and his wife in tail, the remainder to the right heirs of the husband; and the husband alone levies a fine of this, this will not bar the wife, except she suffer five years to pass after his death without making claim, &c. and therefore if the fine be to the use of the husband and his heirs in fee, he may dispose it as a fee simple, and his issue hath no remedy.

Co. 9. 105. 3. \* If a man disseise me of the land I have in fee simple, or fee-tail, and after levy a fine of this land with proclamations, and I do not make my claim, &c. within five years after the proclamations had, hereby I and my heirs are barred for ever of this land (3). And if I being such a tenant in fee make a lease for years, or be the Lord of any copyhold-estate, and my lessee for years, or copyholder in fee or for life, be ousted, and I thereby disseised, and the disseisor levy a fine, and neither I nor my lessee for years, or copyholder, do make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever. And if one disseise me of land, and after make a lease for life of it, and then levy a fine with proclamations, and I suffer five years to pass, hereby I am barred both of the reversion and of the estate for life also.

If tenant for life make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in reversion or remainder do

*This case is distinguishable from Lord v. Power 1 New Rep. in which the estate of the donor was not devised in the husband's fee, and the wife had only a life interest in the land, and the husband's estate was for life by the husband's conveyance to the wife and devisees, and the wife's estate was for life by a certain man, and the wife's estate was for life by a certain man, and the wife's estate was for life by a certain man.*

\* P. 29. 3. Disseisee and the like barred by the fine of the disseisor, &c.

(1) In a fine of the wife's land by husband and wife, the whole estate passeth from the wife, and the consuee is in by her only; and if the husband and wife reverse the fine by writ of error for the nonage of the wife, the whole estate which passeth by the fine shall be restored to the wife. 2 Co. 57. b. — Mr. Hargrave in Note 1 to p. 121. of his edit. of Co. Lit. discusses at length the reason why a feme covert is bound by a fine, and concludes "that the common notion of a fine's binding femes covert merely by reason of the *secret examination* of them by the judges, is incorrect," and, that the *secret examination* should be only deemed the secondary cause of this operation, the primary one being the *pendency* of a *real action* for the freehold of the land.

(2) For she has not her election of jointure or dower till her husband's death; but if the jointure be made before the coverture, and after the husband and wife alien those jointure lands by fine, she shall not be endowed of any other of her husband's lands. Co. Lit. 36. b. — Tho' the law does not relieve feme coverts who thus voluntarily alien their jointure lands, yet if the title to any jointure made before marriage proves to be bad either by fraud or accident, and the jointress is evicted, she shall then (by the provisions of the statute of 27 H. 8. c. 10.) have her dower *pro tanto*, at the common law, 2 Bl. Com. 138. see further Bac. Abr. Jointure (C), and fully as to fines by baron and feme in Vin. Abr. Fine (T) (Bb) (Cb).

(3) The issue in tail shall not have five years, after the death of the tenant in tail the disseisee, for the father had a present right to the entail. Plow. 374. a — but if tenant in tail bargains and sells in fee, and the bargainee levies a fine, tho' five years pass in the life of the bargainor, the issue in tail shall not be bound, but shall have five years from the death of his father. Peniston v. Lister, Cro. Eliz. 896.

not make his claim, &c. within five years, hereby he is barred for ever (1).

If I pretend right or title to land, and enter upon it, and put him out that is in possession, and then I levy a fine with proclamations, with an intent to bar him, and he doth not make his claim, &c. within five years, hereby he is barred for ever, albeit he had the true right and I no right at all. Co. 3. 79.

If I purchase land of H. and after perceiving my title defeasible, and that a stranger hath the right of the land, I do levy a fine to, or take a fine from another with proclamations with intent and of purpose to bar him that hath right, and he suffer five years to pass, and doth not make his claim, &c. hereby he is barred of his right for ever. And in these and such like cases, there is no relief to be had in equity (2). See more in Num. 11. *infra*. Co. 3. 79.  
Doct. & St.  
83. 155.

Equity.

9. Where a fine shall be a bar as to one person, and not to another; or as to one part of the land, and not to another. If there be tenant in tail, the remainder in tail, and the tenant in tail bargain and sell the land by deed indented and inrolled, and after levy a fine with proclamations to the bargainee *sur consueance de droit come ceo*, &c. in this case as to the tenant in tail and his issue this is a bar, but as to all others it is no bar, albeit they never make any claim, &c. So if tenant in tail levy a fine of his intailed land, this is a bar as to him and his issues, but as to all others it is no bar at all, and therefore he in remainder or reversion in their times may enter notwithstanding. \* So if lands be entailed to the husband and wife, and the heirs of their two bodies, and the husband alone levy a fine of this land, this as to the husband tenant in tail and his issues is a bar, but not as to the wife, for she shall be tenant in tail still, and yet it seems she may not suffer a recovery of this land afterwards. So if a man attainted of felony or treason levy a fine of his land, this as to the King and Lord of whom the land is held is void, and is no bar to their advantage \* and title of forfeiture, but as to all others it is a good bar. † So if one levy a fine of lands in ancient demesne and of other lands together, this as to the lands in ancient demesne is not good, nor any bar at all, but as to the other lands it is a good bar (3). Co. 10. 95.  
9. 106.  
Co. 9. 140.  
142.

Recovery.

\* P. 30.

10. The time of claim, and within what time he that hath right to land must make his claim &c. to prevent the bar of the fine.

Parties.

Privies.

Strangers.

1. That have present right and no impediment.

By the ancient common law, he that hath right, was bound to make claim, &c. within a year and a day after the fine levied and execution thereupon, or else he was barred for ever, but this bar by *non-claim* is now gone, and if such a fine without proclamations be levied at this day, he that hath right may make his claim at any time to prevent the bar, and avoid the force of the fine. Co. super.  
Lit. 354.  
262.

Parties to fines, void of impediment at the time of the fine levied, are barred of the land presently, and shall have no time to avoid the same fine by entry, claim, &c. And privies in blood, and privies in representation, claiming by the same title which their ancestor that levied the same fine had, shall be barred by the same fine presently, and that whether they have any impediment or not. Stat. 1.R. 3.  
ch. 7. 4 H.  
7. ch. 24.

Strangers to fines, (being all such as are neither parties nor privies,) who have right to the land whereof the fine is levied, and have no impediment natural or legal, shall have time to make their claim, &c. within five years after the fine levied See the Stat.  
Plov. 374.  
Co. 9. 105.

(1) Not five years from the time of the fine levied, but from the death of the tenant for life.—See note 3 to p. 13— and *post* 31.—also *Lound v. Tucker*, Cro. Eliz. 254.

(2) See further who shall be bound by a fine, 2 Atk. 631. 1 Wood 573. Vin. Abr. Fine, (S).

(3) And may be avoided, as to the land in ancient demesne, by a writ of disseisin. Fitz. Nat. Br. 98. P. see ante 22, note 2.

and

and proclamations had, and no longer. And therefore if lessee for years, tenant by elegit, or by statute, or a copyholder in fee, or for life, be ousted, and he in reversion disseised, they shall have but one five years between them to make their claim, &c. and if they claim not within that time they are all barred for ever, for they have all present right and may bring their action presently: but otherwise it is where the tenant for life, and he in reversion be disseised; for in this case he in reversion is not barred by the first five years after the fine levied, for in that time he can have no action, therefore he shall have time to make his claim five years after the death of the tenant for life. \* If a disseisor levies a fine with proclamations of the land whereof the disseisin was, the disseisee must make his claim within the first five years after the proclamations had, and if he happen to die within the five years, his heir shall not have five years more but so much time more, as to make up the time incurred in his father or other ancestors time, five years; and albeit he be an infant at the time of his ancestors death, yet he shall have no longer time. <sup>a</sup> If a tenant in tail be disseised, and the disseisor levy a fine, the tenant in tail or his issues must make their claim within the next five years after the proclamations passed, otherwise they shall be barred for ever. The like it is in the laches of him in remainder or reversion. <sup>i</sup> And if in these and such like cases, he that hath present right and is without impediment bring upon himself any impediment, as if being within the realm at the time when the fine is levied, he do \* afterwards \* P. 31. go beyond the sea, or the like, in these cases he shall have no longer time than the first five years after the proclamations had.

Esstrangers to fines pestered with impediments of infancy, co-  
verture, madness, idiocy, lunacy, imprisonment, or absence out  
of the realm, at the time of the levying of the fine, and having then  
any present interest or right shall have five years time after the in-  
firmity removed to make their claim, &c. And therefore an infant  
regularly shall have time for five years after he come to his full age  
to make his claim, &c. although he be in his mother's womb at  
the time of the fine levied. And yet if my father's brother disseise  
him, and levy a fine with proclamations, and a year after the pro-  
clamations my father dieth, and after and within five years my un-  
cle dieth; in this case I by reason of my infancy shall have only so  
much time to avoid the same as at the death of my father re-  
mained to come of the five years next after the proclamations, and  
not a new five years, because I claim by the same title that my fa-  
ther had. So if my father or other ancestor be disseised, and the  
disseisor levy a fine with proclamations, and my father or ancestor  
die within five years after the proclamations; in this case I shall  
not have a new five years, but only so much as remaineth of the  
old five years to make my claim, &c. Madmen and lunatics (be-  
ing strangers to the fine) shall have the like time to make their  
claim, &c. as infants have, and yet if this infirmity happen after  
the fine levied, and before the last proclamation be made, these  
persons are not bound to the first years, but shall have five years  
time after they be cured of their maladies. Women covert (esstran-  
gers to the fine) shall have five years time after they be discovert  
to pursue their right. But if a *feme sole* (estranger to a fine) have  
present right, and after the fine levied she take a husband, and so  
five years pass after the proclamations had; in this case she is  
barred

See the sta-  
tutes Plow.  
339. Dier 3.  
Plow. 367.  
377.

Plow. 366.  
375.

Plow. 375.  
379.

2. That have  
present right  
and impedi-  
ment.  
Infant.

*Non sane  
memoria.*

Women  
Covert.



Imprisonment.

Out of Eng-  
land.

barred and shall have no further time to claim. Estrangers to fines, imprisoned at the time of the fine levied, shall have the same time and liberty infants have, but if such imprisonment happen after the time of the fine levied and before the last proclamation made, it seemeth they shall have five years after the enlargement. And estrangers to fines being out of the realm at the time of the levying thereof, shall have five years time after their return to enter or claim, &c. But if they be in *England* at the time of levying of the fine, and after go beyond the seas, and suffer the five years after the proclamations to pass; in this case they shall have no longer time, except they be sent in the King's service and by his commandment. <sup>k</sup> And if the party be beyond the sea at the time of the fine levied, and never return but die there; it seems in this case the fine will not bar his heir at all (1). *Quare of this*

Plow. 360.  
366. 375.  
Plow. 366.  
<sup>k</sup> Sr. Tho.  
Cotton's  
case 27. Eli.

\* P. 32.  
3. That  
have divers  
defects.

\* Estrangers to fines that have divers defects and infirmities, as Plow. 375. infancy, coverture, non-fancy of mind, imprisonment, abience out of the realm, to avoid fines shall have time for five years after the last of the infirmities removed. But if they have divers impediments, and they be all once after the proclamations made wholly removed, and after they fall into the like again and die, in this case their heirs shall not have a new five years, but the first five years begun in their ancestors time immediately after the first impediments so removed shall proceed, and *non-claim* of their heirs during all the residue of the said five years bindeth them, as their said ancestors should have been bound thereby if they had remained void of such impediments during all the said five years. Dier 133.

4. That are without impediment, having future right upon cause precedent.

Esfrangers to fines that have no present, but a future right, and that such as groweth wholly before the proclamations, if they be void of impediment shall have five years time after their right, title, claim or interest first groweth, remaineth, descendeth or cometh to them after the proclamations. And therefore, if a mortgagee be disseised, and the disseisor doth levy a fine with proclamations, and the five years pass, and after the mortgagor payeth or tendereth the money; in this case he shall have time for five years after the tender or payment of the money to make his claim, &c. (2). So if a man levy a fine of his land whereof his wife is dowerable, she shall have five years after her husband's death to make her claim, &c. and not be bound by the five years after the fine. <sup>1</sup> So if tenant in tail levy a fine with proclamations, and after the five years dieth without issue, the donor shall have five years after his death without issue to bring his *Formedon* (3). <sup>m</sup> So if lessee for life levy a fine, or make a feoffment in fee, and the feoffee doth

(1) And his heirs may enter or take their action at any time. 2 *Inst.* 519. 4 *Co.* 125. b.—See also *Chet.* 65. to 68. where the different opinions of *Ld. Coke* in his 2 *Inst.* and of *Ch. J. Anderson* in 1 *Lea.* 211. on *Cotton's* case are stated, and submitted to the reader's judgment.—From an opinion given by a late found lawyer and able conveyancer on this point, it seems he thought that the case in *Leonard*, tho' it might relate to the same family of the *Cottons* as the case in 2 *Inst.* 519, arose probably under some other settlement or limitation, than that mentioned in 2 *Inst.* and that *Ld. Coke's* opinion was good law.

(2) For his title first accrued to him after the proclamations by the payment or tender, upon caufert matter before the proclamations, viz. by the condition made before the fine. *Plow.* 375. If a fine levied by a mortgagee in possession, and five years nonclaim pass thereon, the mortgagor is not barred of his equity of redemption. 1 *Vern.* 132.

(3) In the *reverter*, which action lieth where there is a gift in tail, and afterwards by the death the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs, or assigns. *Fitz. Nat. Br.* 219. E.—

levy a fine ; in this case he in reversion or remainder shall not be bound by the next five years after the fine levied, but he shall have five years next after the death of the tenant for life, and if he die within the five years, his heirs shall have only so much time as to make up the time before his death five years. <sup>a</sup> So also is the law if lessee

<sup>n</sup>Plow. 374.  
Co. 9. 305.

for life be disseised, and the disseisor or a stranger levy a fine ; in this case he in reversion or his heirs shall have five years after the death of the tenant for life, and shall not be bound to the next five years after the time of the fine levied. <sup>u</sup> So if tenant in tail in pos-

<sup>n</sup>Plow. 374.  
10 H. 8. 7.  
Co. 3. 87. 84.  
Dier 3.

session levy a fine and die without issue ; in this case he in the remainder shall have time for five years after the death of the tenant in tail without issue ; and if he make not his claim, &c. in that time, he and his issues are barred for ever (1). The same law is

<sup>p</sup>Co. 3. 87.

for him in reversion or the donor, if there be no remainder. <sup>p</sup> And if tenant in tail discontinue in fee, and the discontinuee levieth a fine with proclamations, and five years do pass, and the tenant in tail dieth ; in \* this case his issue shall have five years after the

<sup>q</sup>30 El.

descender to bring his *Formedon* (2). <sup>q</sup> But if tenant in tail discontinue rendring rent and die, and the issue accept the rent (which doth bar him for his time) and then the discontinuee levieth a fine and dieth ; in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue. <sup>r</sup> And if one *de non sane memorie* make

<sup>r</sup>Plow. 374.

a feoffment, and the feoffee levy a fine, and then the feoffor die ; in this case the heir shall have five years after the death of his ancestor, and not be bound by the five years next after the fine levied.

See the Sta-  
tutes Plow.  
366. 367.  
Dyer 3.  
Plow. 358.

Strangers to fines, that have future right upon any cause pre-  
cedent, being affected with such impediments when the right first  
accrueth, shall have five years after the impediment removed to  
make their claim, &c. And therefore infants that are born, or in  
their mother's womb when such right doth happen to them, women  
covert, mad men, lunatics, prisoners beyond the seas, shall have  
this time. As if a man have issue a son and a daughter, and the  
son doth purchase lands and die, and the daughter entreats as his  
heir, and is disseised by *A.* who levieth a fine, and five years pass  
without claim, and ten years after the father hath another son who  
is heir to his brother ; he shall have in this case a new full five  
years after he come to his full age, for he is the first unto whom  
the right descended after the proclamations. But if a stranger to a  
fine, to whom a remainder or other title first accrueth after the  
fine, do not pursue his right within five years, hereby he and his  
issues are barred for ever. And in like manner if the first issue  
in tail, to whom the title of the tail first accrueth, neglect to make  
his claim, &c. within the first five years after his title accrued ;  
hereby he is bound for ever, and the whole estate tail also. And  
if one abate after the death of a tenant in fee simple, and make a

<sup>s</sup>. That have  
future right  
and impedi-  
ment.

(1) If tenant in tail makes a lease pursuant to the statute 32 H. 8. and then levies a fine, and dies without issue, and afterwards the lease expires ; the reversioner ought to enter within five years after the death without issue (the time when his right accrued) and shall not have five years after the term expired, for he had not then a new right. *Cro. Car.* 156.

(2) But if tenant in tail discontinue in fee and dies, and the discontinuee makes a lease for life, and grants the reversion to the issue, the issue in tail shall not have a *formedon* against the tenant for life, because by his *formedon* he must recover the estate of inheritance, and that is in himself, *Co. Lit.* 297. — See further what shall be deemed a discontinuance and the remedies thereon by *formedon* in descender reverter, and remainder, in *Finch's law*, 190, 267 — *Co. Lit.* 326. b. — 3 *Bl. Com.* 171. 191. — *Finz. Nat. Brev.* 486.

feoffment

feoffment upon condition, and the feoffee levy a fine, and five years pass without any claim made by his heir, hereby the heir is barred for the present, but if afterwards the condition be broken, and the abator enter, then the heir may have an assise of mort-dancester against the abator, or enter when he will.

6. That have no right for any cause before the fine.

Strangers to fines that have neither present nor future right at the time of the levying of the same fines by reason of any matter before the fines levied, whose right groweth entirely before the proclamations, or partly before and partly after, may make their claim, &c. when they please. As if a father die seised of land his elder son being professed, and the younger son entreth and is disseised, and a fine with proclamations is levied, and then the elder son is dearraigned; in this case it seems he is bound to no time (1). So if a tenant cease one year, and then a fine with proclamations is levied, and after the tenant ceaseth another year, the Lord may \* have his *Cessavit* twenty years after the proclamations.

Plow. in Stowell's case.

\* P. 34.

7. That have future rights by divers titles.

And strangers to fines, that have several future rights by divers titles growing at several times, it seemeth shall have several five years to make their claims, &c. commencing from the several times that their titles do first accrue unto them. As if tenant for life, the remainder in fee, make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in the remainder suffer the five years to pass; in this case he is barred of his entry upon the alienation for the forfeiture, but it hath been held that if the tenant for life die, that he shall have another five years time to bring his *formedon* in the remainder. So if the husband make a feoffment of his wife's land to another upon condition, which is broken, and he levieth a fine of this land, and the husband hath issue by his wife and dieth; and the first five years pass and then his wife dieth, hereby he is barred of the title by the condition, but he shall have five years more to make his claim as heir to his mother. But if lands be given to *H.* for the life of *A.* the remainder to *B.* for life, the remainder to *H.* in fee, and *H.* is disseised, and after the disseisor levy a fine, and five years pass; in this case *H.* is barred both of his present and future estate, and shall have no further time to make his claim, &c. and yet if *Cestuy que vie* and he in the mesne remainder die, *H.* shall have another five years to make his claim to preserve his remainder. In like manner it is if land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C.* and he is disseised, and the disseisor levieth a fine with proclamations; in this case, some say *H.* for his present right shall have five years by the first saving of the statute, and five years after the death of *A.* by the second saving of the statute. If one disseise a feme sole, and after marry her, and have issue by her, and the husband is disseised before marriage or after, and then a fine is levied with proclamations, and the husband dieth first, and afterwards the wife dieth within the five years, the issue being of full age, the five years pass, hereby he is bound as heir to his father, but he shall have five years more after the death of his mother to make his claim, &c. *Quando duo jura in una persona concurrunt, æquum est ac si essent in diversis* (2).

Plow. 537. 367. 372.

Plow. 357. 368. 372.

(1) For the doctrine of *Profession*, See *Co. Lit.* 132.—1 *Bl. Com.* 132.—*Vin. Abr. Faits* (C)—*profession* (A) &c. and the several titles there referred to.

(2) See further how the five years nonclaim shall be accounted, *Vin. Abr. Fine* (H. 2.)

Where



Co. 10. 96. 2.  
in Crom-  
well's case.  
Dyer. 157.

Where there is a precedent agreement amongst the parties, as a feoffment or the like, there the fine shall not pass any thing, nor work by way of estoppel, but only by way of corroboration, and shall be guided by the precedent agreement. And therefore if a feoffment be made to two and their heirs, and after a fine is levied to them two and the heirs of one of them, this shall enure as a release, and shall not alter the estate, but if there be no precedent agreement it shall work as it may.

Pitz. Estop-  
pel 211.  
Co. 2. in  
Cromwell's  
case.

If *A.* enfeoff *B.* of certain land in fee, rendering rent, with condition of re-entry for non-payment of rent, and by indenture at the \* same time covenant to levy a fine of the same land to the feoffee to the uses and conditions in the deed of feoffment, and after a fine is levied *sur consuſance de droit come ceo &c.* accordingly; in this case this fine shall enure as a fine *sur release*, because the conuſee hath the fee before, and it shall not enure by way of estoppel, albeit it be a fine *sur consuſance de droit come ceo &c.* And therefore the rent and the condition shall remain in this case, and not be extinct. \* P. 35.

Estoppel.  
Extinguiſh-  
ment.

See before  
at Num. 6.  
part 2.  
N. B. 20.  
stat. 23.  
il. chap. 3.

A fine may be avoided for many causes, as by the death of the parties after the conuſance before the recording of it (1); or by coving in the procuring of it; also it may be avoided for other causes, as for some error in the proceeding in the suing out of the fine, and this is done by writ of error; but this error then that shall make a fine voidable must be notorious, because the thing is done by consent, and it is a rule in law, *Consensus tollit errorem* (2). And by this means if the husband and wife levy a fine, and both of them be within age; whilst either of them be within age they may avoid the fine as against them both. But if there be tenant for life, and he in remainder in tail being an infant, and they two levy a fine, and he in remainder reverse it for infancy, this shall not avoid the fine as to the tenant for life also (3). A fine also is and may be sometimes avoided, or at least lose much of its force by the claim, entry or action of him that hath right to the land (4): for if the estate, contained in a fine, be once within five years after proclamations lawfully defeated, the party hath thereby lost his whole estate both against him which did reverse the same, and against all others which had right or title paramount and made no claim within the five years, albeit he which doth bring the action have no judgment and execution within seven years after the proclamations. In like manner if there be tenant for life, the remainder for life, the remainder in fee; and the first tenant for life alien, and the alienee levy a fine with proclamations, and the second tenant for life claim or enter, &c. this doth make void the fine both against him, and against him in remainder also: for it is a rule, that any one that hath any estate in possession or reversion which

1. Where a  
fine may be  
avoided, or  
not: and  
how.  
1. By a writ  
of error.

Co. 2. 77.  
76.  
How. 358.  
99.  
Co. 9. 106.

2. By a  
claim, entry  
&c. and by  
whom a  
claim, &c.  
may be  
made.

(1) As where the heir of the wife of the conuſor brought a writ of error to reverse a fine levied in *sales*, of the wife's land; the error assigned was that the wife died before the return of the writ of covenant, and the fine was reversed without difficulty. — *Clements v. Langhorne*, 2 *Ld. Raym.* 872. — See also *Salk.* 168.

(2) Any person who brings a writ or error to reverse a fine, must shew that upon such reversal he will be intitled to the land. — See 2 *Bac. Abr.* 537. — Essay on fines 215. — All writs of error for reversing of fines, must be brought and prosecuted with effect within twenty years after the time of levying them, according to statute 10 & 11 *W. 3 c. 14.* with a proviso as to persons under impediments, who are allowed five years after the impediments are removed. — In the case of *Lloyd v. Vaughan*, 2 *Str.* 1257. it was resolved the 20 years were to be computed from the time of the fine levied, and not from the time the title accrued.

(3) But in *Zouch v. Thompson*, 1 *Ld. Raym.* 179. it was adjudged that tho' a fine may be reversed as to part of the land, and remain good as to the residue, yet it cannot be reversed in  *toto* , as to one man, and remain good in  *toto* , as to another.

(4) To avoid a fine there must be an actual entry, 3 *Burr.* 1897, — and by statute 4 *Anne. c. 16.* no claim or entry to avoid a fine with proclamations shall be sufficient, unless an action be commenced within one year next after such entry or claim, and prosecuted with effect.

will be barred by the fine when it is levied, may make a claim or entry to prevent the bar of the fine. As tenant for his own, or for another's life, tenant for years, he in reversion or remainder after an estate for life or years, a copyholder, or the Lord, a Guardian in nature, or nurture, may avoid a fine. And this they may do for themselves and others, and for others without authority precedent or assent subsequent, and the claim of one of them in this case shall avail the other. And by authority also any other man may make a claim, entry, &c. in this case, for him that hath right, and so he may do also without any authority precedent, if the party for whom he doth it do afterwards agree and assent unto it. But a \* stranger of his own head (unless perhaps it be for an infant) cannot make such a claim or entry to prevent the bar of a fine, except he that hath the right do give him authority before it be done, so to do, or do agree to it after it is done. And therefore if a stranger of his own head will make an entry or claim into land whereof a fine is levied, whereunto I have right, and he do it to my use, and I do not agree to it within the five years, this entry or claim will not avoid the fine (1). And yet it was held by Just. *Doderidge, M 2 Car. B. R.* that if a stranger enter in my name and to my use that have the right, this doth vest the estate in me before agreement, and I shall be said to agree until I do disagree.

\* P. 36.

3. By a plea. A fine also may be, and sometimes is, avoided by plea, as by Stat. 4 H. averment of the continuance of seisin of the land in another, at, 7. c. 24 Co. and before the time of the fine levied, and that *partes finis nihil* 3-141. 83. *habuerunt tempore levationis finis*, and then he must shew in whom the estate was. As if lessee for years, or a disseisee, levy a fine to a stranger that hath nothing in the land, or A. be disseised by B. and B. be disseised by C. and B. levy a fine to D. or one that hath a right of a remainder only; or a disseisor make a gift in tail, and the donee make a feoffment to A. and after levy a fine to a stranger that hath nothing in the land. But this plea it seems neither parties nor privies, albeit they be issues in tail, may have at this day (2), but strangers only; and therefore in the last case, the disseisor, and not the issue in tail may avoid this fine by this plea. But if a collateral ancestor, of whom the issue in tail doth not claim the land, levy such a fine, the issue may by this plea avoid it. It seems also the issue in tail may have this plea to a fine *sur release* only.

Also there is a plea by which (as it seems) a fine hath been Co. 3. 84. avoidable, which in effect is nothing else but an averment of seisin Dyer 334. still in the demandant or plaintiff, or his heirs, before, at, and after the time of the fine levied. And this plea (as it seems) no man 290. Stat. 27 E. 1. c. 1. may have at this day but the issue in tail only, to avoid a fine levied *Sur grant & render*, by the ancestor in tail, and not to avoid a fine levied *Sur consueance de droit come ceo que il ad de son done*, &c. and a feme covert, to avoid a fine levied by her husband alone.

4. By a vacat.

If there be two of one name, and one of them levy a fine of 34 H. 6. the land of the other, or a stranger levy a fine in the name of 19 H. 6.

(1) The claim to avoid a fine must be of such a nature as corresponds with the estate, and therefore an entry on the land by a *cestuique trust* is not a sufficient claim to avoid a fine, but it must be by *subpoena* 1 *Cha. Ca* 268, 278, — 2 *Blackst. Rep.* 995. — But it is said claim to avoid a fine by *bill in chancery* is sufficient, and that it ought to be by *cession*. per Catlin, *Dal.* 116. *pl.* 9, 16 *Eliz. Ann.* — See further *Fin. Abr.* Fine, (G. a.) — *Com. Dig.* Claim (B).

(2) For they are debarred the plea *quod partes finis*, &c. by the statute 27 *Ed. 1. de finibus levatis* See 2 *Infl.* 522. *Hob.* 333.

(3) See note 2 to the next page.

(1) *Read.*  
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9.)—*V.*  
(3) *F.*  
general  
*Com.* 36.

him that is owner<sup>(2)</sup> of the land; in both these cases the fine may be avoided by pleading the special matter (3). And yet some hold that in this case the party hath no remedy but by action of deceit (1).

A fine also is, and sometimes may be, avoided by the sentence of a court, when it appeareth to be gotten and obtained by some notorious fraud or practice (2).

\* And now it is high time we come to the second kind of com- \* P. 37.  
mon assurances made by matter of record, viz. a common recovery (3).

(1) See further in what cases a fine may be avoided by a plea. *Vin. Abr. Fine*, (G. b. 3.) and 22 *Co. Read.*

(2) In some cases the court will vacate a fine upon motion, to prevent the parties the trouble and expence of a writ of error. 3 *Lev.* 36. 2 *Wils. Rep.* 115. — In *Hubert's case Cro. Eliz.* 531. where one levied a fine in the name of another not privy nor consenting thereto, the fine was declared void by a *vacat* on the roll: and the Lord keeper in that case said he had always noted this difference. "If one of my name levies a fine of my land, I may well confels and avoid this fine by shewing the especial matter; for that stands well with the fine. But if a stranger who is not of my name, levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine but another in my name; for that is meer contrary to the record; and so it is of all reconusances and other matters of record. But I conceive, when the fraud appears to the court, as here, they may well enter a *vacat* upon the roll, and so make it no fine; although the party cannot avoid it by averment, during the time that it remains as a record." — The offence of levying a fine in the name of any other person not privy nor consenting thereto is punished with death by stat. 21 *Jac.* 1. c. 26. mentioned before. — If a fine be levied by a person who got possession under a forged deed, equity will decree against the fine, per Lord Hardwick in *Gartwright v. Pultney*. 2 *Atk.* 380. — When fines may be set aside in equity, see 1 *Eq. Ca. Abr.* 258. 2. 474. — avoided for fraud, or aided when defective, *Com. Dig. Chancery* (3 N.) and 1 *Ves.* 289. — See more fully how fines may be aided, or reversed, and by whom, *Com. Dig. Fine*. (H.) *Pleader* (3 B. 9.) — *Vin. Abr. Fine* (D. 11.) and *Bac. Abr. Fines* (H).

(3) For a description of the nature and operation of *deeds to lead or declare the uses of a fine*, and some general rules and observations concerning them, See *Chet.* 84 — *Stat. 4 & 5 Ann.* c. 16. §. 15 — 2 *Bl. Com.* 363. — *Bac. Abr. Uses*, and *Trusts* (E). — *post* in the chapter on uses, and *Com. Dig. Uses* (D).



## CHAP. III.

## Of a Common Recovery.

1. Common recovery.  
*Quid.*

Recoveror.  
Recoveree.  
Vouchee.

2. *Quota-plex.*

3. The manner and order of suffering a common recovery.

\* P. 38.

**A** Recovery in general is the obtaining of any thing unjustly taken or detained, by judgment or trial of law. And it is either a common recovery, which is such a recovery as is used for a common assurance of land; or other recovery, which is not used as an assurance of land. And the common recovery that is used for the assurance of land is nothing else but *factio juris*, or a certain form or course set down by law to be observed, for the better assuring of lands and tenements to men. And this is somewhat after the example of the recovery upon title, which is without consent and contrary to the will of him against whom the same is had: for there is in this a colourable suit, wherein there is a demandant which is called the recoveror, and a tenant which is called the recoveree, and one that is called to warrant upon a supposed warranty which is called the vouchee.

The common recovery is sometimes with a single voucher; which is, when the writ is brought against him that is to pass the land, immediately, and he doth vouch over the common vouchee. And sometimes it is with a double voucher; which is when the writ is brought against another, to whom he that is to pass the land, hath aliened it, and he doth vouch him that is to make the assurance, and he doth vouch over the common vouchee: and this is the surest way, and the safest kind of recovery. In this formality of a common recovery, the course is, that by agreement of the parties a real action is begun by a writ of entry brought by him that is to have the land assured, against him that is to make the same assurance, if it be with a single voucher; or if it be with a double voucher, against him to whom he that is to make the assurance, hath aliened the land. And in this suit, the recoveror that doth bring the action doth surmise that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from such a stranger whom the demandant doth name: And to this the tenant doth appear in person or by attorney, and then doth enter into defence of the land, but in pleading doth vouch to warrant; *i. e.* doth alledge that he bought the land of *I. S.* a stranger, who in the conveyance thereof bound himself and his heirs, to warrant and make good the title to him or them to whom it is conveyed, and thereupon he prayeth that *I. S.* may be called in to defend the title, and then he\* is allowed by the court to call in *I. S.* to say what he can for the justifying of his right to the land before he so conveyed it: And hereupon *I. S.* doth appear, and make shew as if he would defend the title, but doth pray a further day may be assigned him to make his defence; which being granted him by the court, at the day appointed he by agreement, covin, and assent of the parties, doth not come in, but make default: And thereupon the lands is to be recovered by him that brought the writ against the tenant, and he is left for his remedy to *I. S.* upon his warranty, and accordingly judgement is given by the court that the demandant or recoveror shall recover the land demanded against

Co. super Lit. 154. See the Preamble of the Stat. of 23. H. 8. cap. 10. 23. Eliz. cap. 3. Doct. & Stud. 41. West. Symb. tit. Recovery.

See the places before. Co. 1. 94. 10. 43. 45.

Experientia.

West Symb. ubi supra.

(1) And  
(2) The  
barring the  
Union of la  
Hale C. J.  
true reason  
conveyance  
C. m. Dig.

F.N.B. 134.  
Co. 9. 6.

the tenant, and that the tenant shall recover so much land of *I. S.* (of his own land) in recompence for the land recovered from him which he ought to have warranted and defended but suffered to be lost (1). And this recovery over is called a recovery in value or *pro rata*. But if the recovery be with a double voucher, or a treble voucher, *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to alledge in the same manner as the tenant doth, and so pray that *I. D.* may come in, and thereupon *I. D.* doth appear and make default: And so if there be more vouchers; and then there must be several recoveries over in value against every one of them; but he that is the last vouchee is always the common voucher, who is one of the cryers of the Court of Common Pleas, a man not worth any thing, and one that hath no land to render in value upon the supposed warranty. And by this devise grounded upon the strict principles of law, the first tenant doth willingly let go the land for the assurance of the purchaser, and yet in truth hath no recompence over, because the vouchee hath no land to render in value. And by this means if one have an estate tail in lands which he is desirous to sell, or to convert into an estate in fee simple, the same is commonly done; for the tenant in tail doth cause the purchaser or some friend of his to bring a writ of entry against him for this land, and he appeareth to the writ, and in pleading saith that the land came to him or his ancestors from such a man or his ancestors, who in the conveyance bound themselves to warrant it: and thereupon that man is called in, who doth appear and make default, and thereupon judgment is had against him in manner as aforesaid. Or if he would have the recovery with a double voucher; then he by fine, seoffment, or deed of bargain and sale inrolled, discontinue the land, and then cause the recoveror that is to have the land to bring this writ of entry against the discontinuee, and he doth vouch the tenant in tail who doth vouch over the common vouchee, and so it is done; and by this the estate tail, that the tenant in tail hath or had, is barred and bound, for that it appeareth now he had no power to entail the land whereunto he had no just title, \* And besides he shall recover a recompence over in value, and this is adjudged in law to go in succession of estate as the land should have done, which is the reason why the recovery is a bar to all that are in remainder and reversion as well as to the issues in tail (2).

Recovery in  
value or *pro  
rata, quid.*

\* P. 39.

Experi-  
entia.

And in the suffering of these recoveries the tenants and vouchees do appear most commonly in person in court, and so the recovery is finished in the court presently without more doing, but sometimes they will not or cannot appear in person, and then they do use to appear and suffer the recovery by attorney. And in that case there must be a consance for a warrant of attorney taken to authorise the attorney or attorneys in this manner if it be for a treble voucher.

West Symb.  
ubi supra.

Glouc'ff. *Prec' A. S. & B. uxori ejus quod juste &c. redd'*  
*C. D. Manerium de N. cum pertinen' &c. quæ clam' esse jus &*

(1) And this agreeably to the doctrine of warranty. 2 *Bl. Com.* 358. 3 *Vol.* 193.

(2) The recompence in value is indeed the true reason for barring the issue in tail; but no reason for barring the reversion or remainder; the reason why they are barred being that the recoveror is by supposition of law, in of the estate tail, and that estate tail, by like supposition of law, continues for ever. *per Hale C. J.* in the case of *Hudson v. Benson and Baron*, 2 *Lew.* 28.—But by *Wilde J.* in the same case—The true reason of Common Recoveries being bars is not the recompence in value but that they are common conveyances.—See further, *Pigot* 14.—*Vin. Abr.* Recovery (A)—*Plowd.* 514.—*Bac. Law Tracts*, 149.—*Com. Dig.* Estates (B. 27.)

*hered' suam & in qua iidem A. et B. non habent ingress. nisi post disseisinam quam H. H. injuste & sine iudicio fecit prefat' C. infra 30. annos jam ultim' elapsos &c. ut dic. &c.*

Glouc'ff. A. S. & B. *po. lo. suo* W. W. & R. R. *attornat. suos conjunctim & divisim versus C. D. de placito terræ.*

Glouc'ff. M. M. *gen. quem* A. S. & B. *vocant ad warrant', po. lo. suo* I. I. & L. L. *attornat' suos conjunctim & divisim versus C. D. de placito terræ.*

Glouc'ff. G. W. *gen. quem* M. M. *voc. inde ad warrant', po. lo. suo* R. G. & R. S. *attornat' suos conjunctim & divisim versus C. D. de placito terræ.*

And in these cases to make two attorneys at the least, and to give them an authority jointly and severally, that if one of them die before the recovery be suffered, the other may have power to do and dispatch it. And these warrants of attorney for the suffering of recoveries are to be acknowledged and certified in the same manner as the connufances of fines acknowledged in the country are (1); save only that recognifances for warrants of attorney for recoveries may be taken by any judge of the Court of Common Pleas or any Serjeant at law without a *Dedimus Potestatem*. But

*Dedimus Potestatem.*

Examination.

\* P. 40.

*Habere facias seisinam.*

if any others take it, they use to do it by a special *Dedimus Potestatem*, which is to command the commissioners therein named to come to such persons, and to take the names of their attorney or attorneys in the suit, and to certify the same into the chancery under their seals such a day (2). And if there be any woman covert that is to make the conufance, it seems she is to be examined, as in the case of the conufance of a fine (3). And when this is done, the recoveries may be suffered by the attorneys without the personal appearance of the parties. And this is as good a recovery as the other which is suffered by the persons themselves appearing in court, but that it will require longer time for the perfection of it; for in this \* case there must go forth a *Summeas ad warrant'* which must have nine returns ere the recovery can be perfected, and by that time one of the parties may be dead (4). And when the recovery is thus suffered by the parties in person or by their attorneys, the same is to be entered by some one of the clerks of the Court of Common Pleas upon the rolls of the same court there to remain upon record. And herein there must go forth a writ of execution called an *Habere facias seisinam*, which is sent to the sheriff of the county where the land doth lie to put the recoveror in possession of the land; (except the recovery be of a reversion of land after a lease for years of it, in which case the reversion shall be in the recoverors by a claim without any writ.) And this writ the sheriff doth return as executed according to the contents thereof, albeit in truth he never do any thing upon it.

(1) By a rule of court of C. B. Hil. 14 Geo. 3. an affidavit of the acknowledgment of every warrant of attorney for suffering a recovery is necessary—wherein the deposing party must swear that he knows the parties;—that they duly signed the warrants on the day and year mentioned in the caption;—that all the parties were at the time of acknowledging of full age and complete understanding;—and if a feme covert is a party, that she was solely and separately examined apart from her husband, and freely and voluntarily consented to, and acknowledged her warrant of attorney;—and that the parties respectively knew that the said warrants of attorney were intended for the suffering of a common recovery to pass his her or their estate.

(2) At common law a recovery could not be suffered by *de. po.* for the statute of Carlisle, 15 Ed. 2. first gave the *dedimus*. T. Roym. 71.—but see Cruise on Recoveries 79, *contra*.

(3) The examination is now totally dilused according to Fig. 66.—but it is otherwise according to the editor or the second edition of that book, feme coverts being examined by the serjeants at the bar when they come to suffer recoveries. See the case of *Sikes v. Oliver*, 5 Mod. 209. where feme covert vouches was under age and appeared by attorney, and the recovery reversed after she came of age: if she had vouched in person, or by guardian, the recovery should not have been reversed for error after full age.

(4) Abridged to five returns by Stat. 16 Car. 1. c. 6. §. 10.—and by Stat. 24 Geo. 2. c. 28. further abridged to four returns. —See 1 Lev. 130. *Winne v. Lloyd*, where the warrant of attorney was tested before the summons *ad warrantizandum*, and on a writ of error, the recovery held good.



And after this all the same proceeding is to be exemplified by the clerk of the same court (1).

A recovery being matter of record is much of the nature of a fine, and such a thing as whereof the law taketh notice; for it is now become a formal and orderly manner of assurance of lands, and one of the common assurances of the kingdom, or a common way and means to pass land from one to another (2); and therefore if a tenant for life suffer such a recovery of his land it is a forfeiture of his estate (3); an use may be averred upon it as well as upon a fine; and it may be avoided for covin as well as any other kind of conveyance. But it is of special use and hath a special virtue to bar and bind estates in tail and all the remainders and reversions thereupon (4). And because many of the inheritances of the kingdom do depend upon this assurance, and it is oft times the greatest security purchasers have for their money, therefore it hath much favour from the law at this day. And therefore the law will not endure it shall be disputed against, for *Communis error facit jus*. And hence it is that it shall not be avoided for small errors, for it is another rule of law, *Consensus tollit errorem*. And if a recovery be suffered by a tenant in tail, hereby he hath not only discontinued, barred and destroyed the estate tail, and so defeated himself and his issues, the former owner of the land, and all the remainders and reversions thereupon that should take place after the estate tail, whether they be in *esse* or contingent only; but also all former estates, leases and charges made by him in remainder or reversion (5): for as when the estate tail in possession is not barred by a recovery, the estates in reversion or remainder are not barred, for *Quod non in magis propinquo non in magis remoto valebit*; so it is *e converso*, where the estate tail in possession is barred by the recovery, all the remainders and the reversions, conditions, charges, incumbrances and estates dependent upon it are barred also (6); except it be \* in some special cases where the remainder or reversion is in the King. And therefore if *A.* be tenant in tail, the remainder to *B.* in tail, the remainder to *C.* in fee, and *B.* or *C.* doth make a lease for years of the land, or grant a rent charge out of the land, or enter into a statute, or the like, or grant the remainder or reversion upon condition; and after *A.* doth suffer a common recovery of the land, and after dieth without issue; in this case the recoveror shall hold the land discharged of all these estates and charges in remainder. But otherwise it is if *A.*

4. The use, nature and operation of it.

Forfeiture. Averment. Covin.

\* P. 41.

(1) The learned author of the commentaries in 2 Vol. p. 361. proposes several methods for shortening the process of a recovery; one of which is, "to empower the tenant in tail to bar the estate tail by a solemn deed to be made in term time and inrolled in some court of record." A deed so made with solemnity would obviate the doubt of the Ld. Keeper in 1 Pr. Wms. 91.

(2) And supported by the judges; and the court of C. B. will amend mistakes in entering up recoveries, 5 Co. 45. Fig. 170.—See fully as to the origin, nature, and use of a common recovery, Fig. 8.—2 Bl. Com. 117, 357.—1 Burr. 115.—1 Will. Rep. pt. 1. p. 73.

(3) If alone, but when he suffers it with voucher of the tenant in tail, the recovery will be good to bind the remainder man.—*Wise man v. Gennings*, Cro. Eliz. 570.

(4) And the power of suffering a common recovery is a privilege inseparably incident to an estate tail, and cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. See 1 Burr. 84. and the authorities there cited to prove this doctrine:—but the tenant in tail, in order to be intitled to such privilege must be tenant in tail in possession; or he must have the concurrence of the prior freeholder who claims under the same settlement. per Ld. Mansfield in *Goodtitle v. Duke of Chandos*, 2 Burr. 1072.

(5) See accordingly and the reason, Fig. 118. but tho' a common recovery bars a contingent remainder, by destroying the particular precedent estate which supported it, yet it bars not a springing use, nor an executory devise. Fig. 127.—and therefore an executory devise is said to be a perpetuity as far as it goes, that is to say, an estate unalienable though all mankind join in the conveyance. *Scatterwood v. Edge*, 1 Salk. 229.—It is a rule that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which, or after which it is limited:—*Fearn*, 3d edit. 306.—If the remainder be in abeyance, a common recovery will bar it. 6 Co. 42. a.—A term limited to commence on failure of issue, may be barred by a recovery. 1 Lev. 35.—A power appendant or in gross, is also barrable by a recovery. Fig. 135.

(6) Because the law considers the conveyance by common recovery in the nature of a real action, and the recoveror is in by right; but it will not bar a mortgage, because that is to be considered as a charge upon the estate, and cannot be defeated. per Ld. Hardwicke. 2 Atk. 591.

himself

himself make a lease, or enter into a statute, and then suffer a common recovery of the land; in this case this recovery doth not avoid, but affirm the lease or charge; for whereas it was before avoidable by the issue in tail or him in remainder or reversion, now it is good against them all, and the recoveror also shall hold it charged and subject to the lease and charge of the tenant in tail (1). This kind of assurance therefore is in some respects better than a fine, for a fine will bar the heir in tail, but not him that is in the remainder, or reversion; but a recovery will bar them all.

g. What shall be said a good common recovery: and who shall be barred and bound thereby; or not.

Infant.

Women covert.

In every good and binding common recovery these things are requisite. 1. That there be a demandant, a tenant, and a vouchee, as the efficient causes thereof; for if either of these be wanting it is not a complete recovery. And therefore if a common recovery be had against the tenant in tail without a voucher, this is void. And for this it is to be known that such persons and by such names may be demandants, tenants, and vouchees in recoveries, as may be cognisors and cognisees in fines. <sup>a</sup> And therefore a recovery suffered by an infant appearing by his guardian is good, and will bind him and all others (2). <sup>b</sup> So also a recovery had against a woman that hath a husband, being joined with her husband, will bind her and all others. 2. That there be land demanded as the matter, and that the thing be demandable. And for this it is to be known that of such things, and by such names, as a writ of covenant for the levying of a fine may be had, a writ of entry for the suffering of a recovery may be had; save only it may not be *de fossato, stagno, piscaria, un' carucat' terræ, estoveriis, homag' fidelitat', de servitiis faciendis, de bovata terræ, de marisc', de selion' terræ, de gardino, cottagio, crofto, vergata terræ, fodina, minera, mercatu, nec de superiori camera*: and yet of some of these also it may be by other names: also a recovery may be had of a rent, common advowson, franchises, and the like, but not of an annuity (3). 3. That it be had and suffered in that order and form as law requireth, viz. that there be a writ of entry brought, and appearance of the tenant *in fait*, a voucher, and an appearance of the tenant in law the vouchee, judgment and execution in manner as aforesaid; for if there be any substantial defect in these things the recovery may be thereby \* avoided by writ of error; but if it be only in form it will not hurt. 4. That there be a lawful tenant to the precept, *i. e.* that the writ of entry be brought against one that at the time of the writ brought is tenant of the freehold, either by right, *i. e.* that hath an estate for life at least in the land, or by wrong, *i. e.* that is a disseisor of the land demanded and whereof the recovery is had (4). And therefore in this case the course is where the land to be reco-

West.Symb. ubi supra. Co. super Lit. 372.

<sup>a</sup> Benet's case. Hobart's Rep. 275. Paic. 9. Jac. Earl of Newport's case adjudged. <sup>b</sup> Co. 10. 43. Plow. 515. 2) Doct. & Stud. 52. Co. 5, 40, 41. West. ubi supra.

Co. 3. 3. stat. 23 Eliz. c. 3.

Dyer 252. Co. super Lit. 46. 3. 6.

Co. 3. 6. super Lit. 46. Lit. Sect. 519.

(1) Tenant in tail mortgaged for years, and died without suffering a recovery; and a mortgage held not good.—If he had suffered a recovery afterwards it would have let in the mortgage. *Beek v. Welsh*, 1 *Wils. Rep.* 276.—As to the operation of a recovery, by letting in all the preceding incumbrances, and rendering valid all the preceding acts of the tenant in tail, see *Pigot* 120—*Cruise* on Recoveries, 159.

(2) As to recoveries suffered by infants, see *Fig.* 64, and further in *Vin. Abr.* Recovery common (D). *Com. Dig.* Infant, (B2).—In what cases equity will decree *infant trustees* to join in a recovery, 1 *Pr. Wms.* 536. 3 *Atk.* 559.

(3) A common recovery in the common pleas of *copyhold lands* will not pass them, but if lands are *customary freeholds*, and pass by surrender in a borough court, a recovery in C. B. of such lands will be good. *Oliver v. Taylor*, 1 *Atk.* 474. but see *contra* the opinion of *Willes* Chief Justice, in the case of *Carr v. Singer* in 2 *Vesf.* 603.—For the method of suffering recoveries of *copyholds*, see *Fig.* 100—*Bac. Abr.* Copyhold (C).—Recovery may be suffered of a *trust estate* (by *cestuique trust*) as effectually as it may of a legal estate. See 1 *Pr. Wms.* 91. 9 *Mod.* 143.—*Fearne* 246.—See further, of what things a recovery may be suffered, *Vin. Abr.* Recovery (S).—*Wilsf.* 283.—*Fig.* 97.

(4) Otherwise the recovery is void according to *Fig.* 28, but if there is no tenant the recovery is good against the party who suffered it, by way of *disseisin*, tho' not against remainder men or strangers. 10 *Mod.* 45.—Tenant to the precept may be made either by *fine*, *seoffment*, *lease* and *release*, or by *bargain* and *sale* inrolled. *Wilsf.* 281. See further *Vin. Abr.* Recovery (U). *Com. Dig.* Recovery (B. 3.) *Fig.* 65, 72.—As to the doctrine of tenant to the precept by *disseisin*, see the cases of *Taylor v. Horde*, 1 *Barr.* 60, and *Goodtitle v. Duke of Chandos* in 2 *Barr.* 1065.

vered

Plow. 514.  
Doct. &  
Stud. 49.  
See infra.

vered is in possession, and a fine and a recovery is had of it together, the fine is sued out first, for this doth make the conusee tenant of the freehold of the land, and then the recovery is had against him (1). And when the recovery is to be had of a reversion, and that there is an estate for life in being of the land whereof the recovery is to be had, (for an estate for years, or any such like estate, will not hinder the suffering of a recovery,) there the course is to get a conditional surrender from the tenant for life of his estate to him in reversion or remainder, to the end that he may be perfect tenant of the inheritance, and then the writ of entry may be brought and the recovery had against him (2): for if a writ of entry be brought against a stranger, and he vouch the tenant in tail in possession of the land, and so a recovery is had, or if there be tenant for life of land, the remainder or reversion to another in tail or in fee, and a stranger doth bring a writ of entry against him in the remainder or reversion, or against a stranger who doth vouch him, and so a recovery is had; these recoveries are not good. And yet if the writ be brought against the tenant of the land and a stranger that had nothing in the land together, and so a recovery be had; this recovery is good enough. And if a disseisor make a gift in tail of the land to another, and the writ is brought against him, and he vouch the disseisee, and he vouch the common vouchee; this is a good recovery. 5. That it be in such a case as is not prohibited by some statute law (3): for if the King give any of his own land whereof he is seised, or cause or procure another to be in consideration of money or other land to give the lands whereof he is seised in tail to any of his subjects or servants in recompence of their service, or the like, the remainder to the King in fee simple, or fee tail; such estates in tail cannot be barred by a common recovery: And therefore if such a tenant in tail shall suffer a recovery of such land it is void, and it will neither bar the issues in tail, nor any of them in remainder, nor the King (4). But if the King make such a gift in tail, keeping the reversion to himself, and after doth grant a reversion to another; in this case the tenant in tail may suffer a recovery, and bar the estate tail and the

(1) Tenant to the precipe made by fine, recovery suffered, fine reversed; yet held a good recovery, for there was a tenant at the time. 2 Salk. 568. *Lloyd v. Evelyn*.

(2) And though the tenant for life keeps the possession, yet the recovery will be good. *Fig. 41.* and such surrender by tenant for life shall be presumed on a recovery of forty years standing. 2 Str. 1129, 1267. see further 2 Burr. 1069.—By the statute of 14 Geo. 2. c. 20, for amending the law of recoveries, It is enacted, that common recoveries suffered without any surrender of *leases for lives*, or without the concurrence, or any conveyance or assurance from any such lessees, or other persons claiming under them, in order to make good tenants to the writs of entry, or other writ whereupon such recoveries shall be suffered, shall be as effectual in law, as if such lessees or other persons claiming under them, had conveyed or joined in conveying a good estate of freehold to the tenants in such writs. *Provided* the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate for life in being) in reversion or remainder, next after the expiration of such leases, shall convey or assure, or join in conveying or assuring an estate for life at the least, to the tenants in those writs. By this act also purchasers for a valuable consideration, may, after twenty years from the time of their purchase, produce the deeds making tenants, &c. and declaring the use of recoveries, as sufficient evidence of the recoveries, *in case no record of the recoveries can be found: Provided* the persons making the deeds had sufficient estate and power. And by this act also common recoveries, shall, after the expiration of twenty years from the time of suffering them, be deemed valid, if it appears upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had sufficient estate and power to suffer the same, *notwithstanding the deed or deeds for making the tenant to such writ should be lost or not appear.* For the operation of this statute, see 1 Burr. 115.—2 Burr. 1074.

(3) Or by some legal disability, as attainder, or being an alien, &c. see *Fig. 73.* The disabling statute 11 H. 7. c. 20. as to recoveries by feme coverts of lands *ex provisione viri*:—33 H. 8. c. 31. as to recoveries by tenant for life without the consent of him in remainder or reversion:—34 & 35 H. 8. c. 20. as to recoveries of lands of the gift of the Crown:—and 14 Eliz. c. 8. as to recoveries by covin; are explained in order, and illustrated by case and determinations under them respectively, in *Fig. 75* to 96.

(4) See the cases of *Murray v. Eyton & Price*, T. Raym. 338. and *Neal v. Wilding*, 1 Wils. Rep. 275. and further *Com. Dig. Estates (B. 31.) Vin. Abr. Recovery (A).*



\* P. 43.

reversion also. And where a subject by the King's provision doth make such a gift in tail, and then doth grant the remainder to the King for life or years only; in this case the estate tail, remainders, \* and reversion also, may be barred by a common recovery. So in other cases where a subject doth make a gift in tail, the remainder to the King in fee; this estate tail may be barred by a common recovery. And therefore if there be tenant in tail, the remainder or reversion in fee to another, and he in remainder or reversion by deed indented and inrolled, doth bargain and sell his remainder or reversion in fee to the King; or if one covenant to stand seised to divers uses in tail, the remainder to the King in fee; in these cases the estates, and the reversion and remainders depending thereupon, may be barred by a recovery. So if a man make a gift in tail, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the King in fee on condition the estate shall be void upon the tender of 20*l.* in this case the estate tail, and the reversion also, and condition thereupon, may be barred (1). So if the Duke of Lancaster had made a gift in tail, and the reversion had descended to the King; this estate tail might have been barred by a recovery. So if Prince H. son of H. 7. had made a gift in tail, the remainder to H. 7. in fee, which remainder by the death of H. 7. had descended to H. 8. in this case the tenant in tail might have barred the estate tail by a recovery (2). And yet if the King make a gift in tail, the remainder in tail, or grant the reversion in tail; in these cases a common recovery may not be suffered to bar the intail, remainder, or reversion. And if the husband for the advancement of his wife in jointure, and the preferment of the heirs of their two bodies, make an estate in tail to him and his wife and the heirs of their two bodies, and the wife after her husband's death alone by herself, or with any other husband, suffer a common recovery of the land whereof this estate is made; this recovery will not bar the estate tail. But if in this case the recovery be suffered by the heir in tail, or by the heir and his mother together, it is a good recovery. And therefore if A. be seised of land in fee, and he make a feoffment in fee, to the intent that the feoffee shall reconvey it to him and his wife and the heirs males of his body; and this is done accordingly, and they have issue a son, and she surrender, or make a forfeiture, and he enter and suffer a recovery; this is a good recovery, and bar to the estate tail: or if the writ be brought against the mother, and she vouch the heir in tail, and so a recovery is had, this recovery will bar the estate tail. And howsoever at the common law a recovery against a tenant for life with a voucher upon a lawful warranty and a recovery in value, was a bar to him in remainder or reversion, and there was no remedy in this case, yet at this day it is otherwise (3). And therefore if tenant in tail after possibility of issue extinct, tenant by the courtesy, or any other tenant for life, do suffer their lands to be recovered from them by \* covin and agreement, either as immediate tenants or as

(1) See accordingly. 2 Co. 52. a.

(2) See accordingly. Co. Lit. 372. b.

(3) See distinction between recovery suffered against tenant for life, upon the ground of its being suffered with his consent, or without; and its different operation in those cases as to remaindermen and reversioners; Co. Lit. 362. a. and further as to recovery against tenant for life, Wilf. 274.

vouchers

a See be  
in fines a  
Co. super  
Lit. 44.  
b Plow.  
Manxel's  
ca. e.  
Co. 10. 3.  
1. 94. Plow.  
357.

(1) Te  
still rema  
(2) Bu  
the tenan  
mon vouc  
(3) Ac  
true of a

vouchees upon feigned titles, without the assent, and to the prejudice of him in remainder or reversion; such recoveries are void, and will not bar the remainders or reversions, but are forfeitures of the estates of such tenants for life (1). Inasmuch that if tenant for life be made tenant in fait to the writ, or tenant in law upon the voucher, and so a recovery be had; as if tenant for life make a lease for years, and the lessee for years doth make a feoffment in fee, and the feoffee doth suffer a common recovery in which the tenant for life is vouched, and he vouched the common vouchee; these recoveries will not bind the reversions or remainders. But there is no provision made at this day to preserve the reversion or remainder expectant upon an estate tail, nor to avoid a recovery of the tenant for life, where he in the next remainder is agreeing and assenting to it. And therefore if there be tenant for life, the remainder to *A.* in tail, the remainder to *B.* in tail, &c. with divers remainders over; and the tenant for life doth suffer a common recovery, in which he doth vouch *A.* who doth vouch the common vouchee; in this case this is a good recovery and doth bar the estate tail, the remainders, and reversion also (2). And if one be seised of land in fee and have two sons, *A.* by his first wife, and *B.* and a daughter by his second wife, and he devise the land to his wife for her life, the remainder to *B.* his son in tail; and the reversion of the fee descend to *A.* and the writ of entry is brought against the tenant for life, and she vouch *B.* and he doth vouch the common vouchee, and so a recovery is had without the assent of the heir in reversion; this is a good recovery and a bar to all the estates in possession, remainder and reversion. And if a writ of entry be brought against the tenant for life, and he make default after default, and then the next in remainder in tail is received, or he pray in aid of him in reversion or remainder, and then they vouch over, and so a recovery is had; this is a good recovery and a bar to all the estates in remainder and reversion. But if the writ of entry be brought against the tenant for life and him in the remainder in tail together, and they vouch the common vouchee, and so a recovery is had; this will be no good recovery to bar the estate tail (3). <sup>a</sup> And if spiritual persons, as Bishops, Deans, Parsons, and such like, suffer a recovery of their ecclesiastical lands; such a recovery is void and will not bind the successor. <sup>b</sup> But if it be not in some such prohibited case as before, and the recovery be had and suffered by and between such persons, and of such things, and in such a manner as aforesaid; in such cases, albeit there be in truth no warranty made upon which the voucher is had, and albeit there be nothing to be recovered in value, for that the vouchee hath no land to recover over in recompence, and albeit that no execution be done in the \* life time of the party \* P. 45. against whom the recovery is had, yet is the same regularly a perpetual bar to the parties against whom the same is had and their heirs, of all the estates they have in fee simple, fee tail, or for life

<sup>a</sup> See before in fines and Co. super Lit. 44. <sup>b</sup> Plow. Manxel's case. Co. 10. 373. 1. 94. Plow. 357.

(1) Tenant for life suffers a recovery, and afterwards reverses it by a writ of error, but the forfeiture still remains, *Skinm.* 74.

(2) But see *Pig.* 27. where a recovery with treble voucher is recommended as preferable, wherein the tenant to the præcipe should vouch the tenant for life, who shall vouch *A.* who should vouch the common vouchee.

(3) According to *Leech. v. Cole*, *Cro. Eliz.* 670. and *Vin. Abr.* Recovery (D). see further as to the doctrine of a joint præcipe, *Pig.* 36.

in them, and against all them in remainder or reversion, and the remainders and reversions that are depending upon their estates: with this difference, the recovery with the single voucher doth not bar any estate but such as the tenant in tail hath in possession at the time of the recovery had, so that if the tenant in tail be in any other estate, as by disseisin, or the conveyance of the disseisor, or the like, this estate is not barred: but the recovery with the double voucher doth bind and bar all interests, estates and titles that the vouchee hath at the time of the entry into the warranty (1). All which is further illustrated by the examples following. <sup>c</sup> If the writ of entry be brought against the tenant in tail, and he vouch the common vouchee, and so a recovery is had; this recovery with a single voucher is a good recovery and a bar to the estate tail, if it be then in possession and not put to a right, and to all the remainders and reversions depending thereupon (2). <sup>d</sup> So if lands be given to A. in tail, the remainder to the right heirs of B. (B. being then living) and the writ of entry is brought against the tenant in tail, and he doth vouch over the common vouchee; this is a good recovery, and a bar to the estate tail and the remainder also. But if the tenant in tail be disseised, and then suffer a recovery with a single voucher; or the disseisor make a new estate in tail to the tenant in tail, and then the tenant in tail doth suffer a recovery with a single voucher; or if the tenant in tail make a feoffment in fee of land, and then take back a new estate to himself from the discontinnee in tail or in fee, and then doth suffer a common recovery with a single voucher; by this recovery the intail is not barred (3): but by a recovery with a double voucher in these cases the estate tail is barred. And therefore as where the tenant in tail doth levy a fine, make a feoffment, or bargain and sell the land by deed indented and inrolled, and the writ is brought against the conusee, feoffee, or bargainee, and he doth vouch the tenant in tail, and he doth vouch the common vouchee; this doth bar the estate tail and the remainders and reversion depending thereupon: So if in these cases the conusee, feoffee, or bargainee, doth make a new estate in tail to the conusor, feoffor, or bargainor, or he disseise the conusee, feoffee, or bargainee, and then levy a fine, make a feoffment, or bargain and sell to another against whom the writ of entry is brought, and he vouch the tenant in tail, and he doth vouch the common vouchee; by this recovery the first and second estate tail and all the remainders and reversions depending thereupon are barred. So if lands be given to I. S. and the heirs males of the body \* of his wife engendered, and he hath issue a son, and after his wife dieth, and he discontinue, and take an estate to him and the heirs females of the body of his second wife, and after discontinue again, and take an estate to him and the heirs females of his own body, and after discontinue again, and the writ of entry is brought against the last discontinnee, and he

\* P. 46.

(1) See accordingly *Bro. Abr. Taille* 32. *Bac. Abr. Fines and recoveries* (C). *Wilf.* 245.

(2) If tenant in tail covenants to stand seised to the use of himself for life, with remainder to his sons in tail, and afterwards suffers a recovery (being himself tenant to the precipe and vouching over the common vouchee) to other uses in fee, the uses on the recovery will be good: for where tenant in tail covenants to stand seised to the use of himself for life, with remainder to his issue in tail, it is void, and will not alter the estate tail. *Com. Rep.* 119.—*Salk.* 619.

(3) Because a recovery with single voucher bars only such estate whereof the tenant in tail was actually seised in law, and not in right only, at the time when the recovery was suffered. *Vin. Abr. Recovery* (C). *Pig.* 115.

doth



doth vouch the tenant in tail, who doth enter into the warranty generally, and voucheth the common vouchee; this is a good recovery and a bar to all the estates in tail, and the remainders and reversions also. And if *A.* before the statute of uses had been tenant in tail, and had made a feoffment in fee to *B.* and he and *B.* had after made a feoffment to *C.* to the use of *A.* and his wife and the heirs of their two bodies, and then she had died, and after *A.* had entered upon *C.* the feoffee, and made a feoffment to *W.* in fee, against whom *I. S.* had brought a writ of entry, and he had vouched *A.* the tenant in tail; this had been a good recovery, and a bar to all the estates. And if lands be given to husband and wife and the heirs of the body of the husband, with remainders over to strangers, and the husband alone doth discontinue the whole land by fine, feoffment, or bargain and sale indented and inrolled, and the writ of entry is brought against the discontinuee and he doth vouch the husband alone without the wife, and the husband doth vouch the common vouchee, and so a recovery is had; this is a good recovery for the whole land, and a bar to all the estates in tail, and remainder, and reversion, but not to the estate of the wife for her life after the husband's death. But if lands be given to the husband and wife and the heirs of their two bodies, with remainders over to strangers, and the husband alone discontinue, and the recovery is suffered as in the last case; it seems this is no bar to the estates in tail, or remainder, or reversion, for any part of the land. And yet if lands be given to *I. S.* and *I. D.* in tail, and *I. S.* discontinue the whole, and the writ of entry is brought against the discontinuee; and he vouch *I. S.* alone; this is a good recovery for the one half of the land, and a bar to all the estates. And if lands be given as before, to husband and wife and the heirs of their two bodies, and the writ of entry is brought against them both, and they vouch the common vouchee, or the husband alone doth discontinue, and the writ is brought against the discontinuee, and he vouch the husband and wife both, and they enter into the warranty, and vouch the common vouchee, and so the recovery is had; these are good recoveries for the whole, and a bar to all the estates in tail, and to the estate of the woman, and to all other estates. And where lands are given to a man and his wife and the heirs of the body of the wife; or to the wife and the heirs of her body, and the writ of entry is brought against the husband and wife, and they vouch \* the common vouchee; these are good recoveries and will bar the husbands and wives, and the estates in tail, remainder, and reversion. And where a man hath land in which his wife hath a jointure, or to which she will have title of dower after his death, if the writ of entry in this case be brought against them both, and they vouch the common vouchee, and so a recovery is had, this recovery will bar them both: But the husband alone without her cannot bar her of any such estate by a recovery, for she may falsify and avoid it after his death (1). And if lands be given to husband and wife and the heirs of the body of the husband, and the writ of entry is brought against the husband

Husband  
and wife.

\* P. 47.

(1) Tenant in tail cannot suffer a recovery without the concurrence of the jointress, where the lands are limited to her, *Taylor v. Horde*, 1 Burr. 116. see also 1 *Brown's Parl. Ca.* 69. If a recovery be suffered of the wife's lands, by the husband and wife, this is as effectual to bar the right of the wife by the custom of London, as a fine at common law. 1 *Rel. Abr.* 556.

alone

alone, and he vouch the common vouchee, and so a recovery is had with a single voucher; this is no good recovery for any part of the land, nor bar to any of the estates, albeit the husband do survive the wife (1). And yet if lands be given to two others, and the heirs of the body of one of them, the remainder over to a stranger, and the writ of entry is brought against one of them, and he vouch the common vouchee, and so a recovery is had; this is a good recovery, and a bar to all the estates for the one half of the land. If lands be given to *A.* in tail, the remainder to *B.* in tail, the remainder to *C.* in tail, the remainder to *D.* in fee, and *A.* doth make a feoffment in fee, and the writ of entry is brought against the feoffee, and he doth vouch *B.* (being him in the second remainder in tail) to warranty, and he doth vouch the common vouchee; this is a good recovery, and a bar to the second estate tail and all the remainders and reversion depending thereupon; and yet it is no bar of the first estate tail which *A.* hath. If the writ of entry be brought against a mortgagee, and he doth vouch the common vouchee, and so a recovery is had; this is no good recovery to bar or bind the mortgagor, but that he may enter upon the condition broken. So if one give lands to *B.* and his heirs, so long as *C.* shall have heirs of his body, and *B.* doth suffer a common recovery, and vouch the common vouchee; this is no good recovery to bar the donor of the possibility, for in both these cases he that is to be barred hath no remainder or reversion, but an interest or possibility which cannot receive a recompence in value. But if in these cases the mortgagee vouch to warranty the mortgagor, or *B.* the donee vouch the donor, and so they vouch over the common vouchee, and so the recovery is had; these will be good recoveries to bar both them and their heirs for ever. And if one have an estate in fee simple determinable on a limitation or a condition, as if lands be given to *A.* and his heirs until *B.* pay to him 100*l.* and then that it shall remain to *B.* and his heirs, and *A.* in this case doth suffer a common recovery and vouch the common vouchee; it seems this is no bar to *B.* and his heirs, but that upon payment of the 100*l.* he shall have the land. So if \* one by his will devise his land thus, I give unto *A.* my son and his heirs for ever my land in *W.* paying 20*l.* to *B.* when *A.* shall come to twenty one years of age, and then that *A.* and his heirs shall have it for ever, and if *A.* shall die without heirs of his body, *C.* being then living, that then *C.* shall have it to him and his heirs for ever, and *A.* pay the 20*l.* to *B.* at his full age, and then suffer a recovery of the land, this is no bar to *C.* of his estate. But here it must be noted, that in the cases before, where it is said that a recovery is void, it is meant as to the heirs and them in reversion and remainder, for as to the parties themselves that do suffer the recovery the same is for the most part good, and doth bind them by way of estoppel and conclusion (2). And it must be noted also that a stranger, that hath right to the land at the time of the recovery

Co. 3. 6.

Curia Mic.  
18 Jac. B.R.  
So was it  
he'd by most  
of the Judges  
in the case  
between  
Pell and  
Brown.

Co. 3. 5.

\* P. 48.

(1) Because at the time of the recovery there were no moieties between him and his wife, and the remainder depends upon the intire estate, and the husband was not seised by force of the tail, and precisely brought against him only, see *Vin. Abr.* Recovery (D 2).—See further as to recoveries suffered by husband and feme of the wife's lands, or where they are jointly seised for life, or in tail, *Com. Dig.* Baron and Feme (G 2).—*Ca. temp. Tal.* 164. *Comyns Rep.* 565.—*Pigot* 70.—*Wilson* 269.—*Cruise* 142.

(2) By the Stat. 21 Jac. 1. c. 26. Persons levying fines or suffering recoveries in the name of any other Person not privy or consenting to the same, are guilty of felony without benefit of clergy.

suffered

Stat. 7 H.  
cap. 4.  
Dier 31.  
Co. lupt.  
Lit. 104.

Stat. 23  
cap. 3. C.  
5. 40.  
21 H. 8.  
cap. 15.  
super Lit.  
46. 104.  
Co. 3. 7.  
Dier 249.  
Co. 3. 4.  
1. 62.  
Plow. 51.

(1) As  
doing so,

suffered, is not barred at all by the recovery or by his laches of *non-claim*, &c. as in the case of a fine.

Stat. 7 H. 8. The recoverors in common recoveries their heirs and assigns shall have the like remedy against lessees for lives or years of the land recovered, their executors or assigns, by distress, avowry, or action of debt, for the rents and services reserved upon their leases that shall be due after the same recoveries had: And also like actions for waste done after the recovery had: And like remedy upon a disturbance in a presentation to an advowson, and in like manner and form as the lessor should or might have had if the same recoveries had never been had, albeit the same lessees do never attorn to the same recoverors. And if a man make a lease for years to begin at Michaelmas reserving rent, and before Michaelmas he suffer a recovery; in this case the recoveror shall distrain for this rent, which the lessor before the recovery could not distrain for. But if the recovery had not been had he might have distrained.

6. The remedy of recoverors against the lessees for rents and services, and upon waste done.

Stat. 23 El. cap. 3. Co. 5. 40. 21 H. 8. cap. 15. Co. super Lit. 46. 104. Co. 3. 78. Dier 249. Co. 3. 4. 1. 62. Plow. 515. A recovery may be defeated, frustrated and avoided (which is called the falsifying of a recovery) in part, or in all, for many causes; as for that there is some gross and substantial error in the manner of the proceeding; but a recovery is not avoidable for false or incongruous latin, rasure, interlining, mis-entring of any warrant of attorney, mis-returning or not returning of the sheriff, or other want of form in words, and not in matter of substance, because it is done by the consent of the parties. Or it may be avoided, for that he against whom the writ of entry is brought is not tenant of the freehold by right or wrong at the time of the writ brought, as when the writ is brought against a stranger that hath nothing in the land, and he doth vouch the tenant in tail in possession of the land. Or a recovery may be avoided, for that he that hath the estate and the right is neither party nor privy to the recovery, as when the writ of entry is brought against a disseisor, and he vouch a stranger that hath nothing in the land, or a recovery is had against the husband alone of the land whereunto his wife hath title of dower. Or a recovery may be avoided, for that another hath some estate in the thing whereof the recovery is had at the time of the recovery suffered, as when there is a recovery had of land whereof there is a lease or estate for years, by statute, elegit, or the like. Or it may be avoided, for that the recovery is had by covin, as when it is suffered by tenant for life to disinherit him in reversion, or when it is gotten by some undue practice and sinister dealing; for in this case it is sometimes made void by a *vacat* or sentence of a court. And where a recovery is avoidable or reversible for any of these or such other like causes, it must be avoided by him whom it doth concern, that is barred and bound by the same recovery, that should have had the land if the same recovery had not been, and not by any other whom it doth not concern. As if an erroneous recovery be suffered by tenant in tail, in this case his issues, or if they fail, the next in remainder or reversion shall defeat it (1). So also if the land be recovered against a stranger, the tenant in tail shall avoid it: And if the land be recovered against a disseisor, the disseisee shall avoid it: And if the land be recovered against him in reversion or remainder, the

7. Where a recovery may be avoided; or not: and by whom; and how. *Fauxifier de recovery.*

\* P. 49.

(1) As to the right of a remainderman to reverse a recovery erroneously suffered, and the manner of doing so, see 1 Burr. 410. *Sheepshanks v. Lucas*.



tenant for years by statute or elegit shall avoid it; but in these last cases they shall falsify and avoid it during their particular estates only. So also the wife shall falsify the recovery suffered by her husband alone as to her title of dower only, and no longer and further. And he in the reversion or remainder shall falsify and avoid the recovery suffered by the tenant for life, either in the life time of the tenant, or afterwards. But neither he in reversion or remainder, or any one by or under him, or any other, can falsify a recovery suffered by the tenant in tail in possession, except it be for some such causes as before. And the recoveror himself cannot falsify a recovery (1). So neither can a guardian (2); nor a tenant of a manor; as if one hold land of a manor, and a stranger recover the manor by a feigned title; a tenant of the manor cannot falsify this recovery. And in all these cases where a recovery is avoidable and a man hath power given him to falsify, he must do the same sometimes by writ of error, as in the case of an erroneous proceeding; and sometimes by pleading and the setting forth of the special matter, as in the case where the tenant is not tenant of the freehold, or when the recovery is had by covin against the tenant for life, or the like; and sometimes by the shewing and setting forth of the practice to the court, and a motion made that a *wadat* may be made upon the judgment for the causes alledged (3).

- And thus having done with the common assurances that are
- P. 50. made \* by matter of record, we come to the common assurances that are made by matter of *fait*, viz. by deeds and instruments of writing in the country; wherein we must stay a while upon the learning of deeds in general, and from thence we shall descend to the particular kinds of deeds (4).

(1) Where it is said to be a rule, that a party to a recovery shall not falsify, it must be understood with these exceptions: 1st. If the party can shew the recovery was void in law: 2dly, If the recovery was of lands in *D.* and they lie in *C.* or 3dly, if the recovery was on a writ that is abated. *Fig.* 162.

(2) As to reversal of a common recovery by an infant for nonage, see 1 *Mod.* 49. and the numerous references in the margin of that book.

(3) See further by whom and in what manner a recovery may be avoided, *Com. Dig.* Recovery (B 6.) *Bac. Abr.* Fines and recoveries (D). *Fig.* 156. *Bro. Abr.* tit. Fauxifier de recovery. *Vin. Abr.* Recovery (A 2).

(4) A fine, recovery, and deed to lead the uses, are altogether but one conveyance, tho' they have several operations. *Fig.* 26. For the doctrine concerning declaring the uses of a recovery see the books referred to at the end of the chapter on fines, and also the case of *Stapilton* and *Stapilton*. 1 *Atk.* 2.

## C H A P. IV.

## Of a Deed.

Terms of  
the law.  
Co. super  
lit. 35.

Terms of  
the law.  
Co. super  
lit. 229.  
43. 38 H.  
25.

A Deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed.

1. A deed.  
Quid.

All deeds are either indented, or poll. The deed indented (which is that which is called an indenture) is when the paper or parchment is cut and indented. And it is defined to be a writing, containing a conveyance, bargain, contract, covenants, or matter of agreement, between two or more; and is indented in the top or side answerable to another that likewise doth comprehend the self same matter. And this is so called because it is so indented; for albeit it be called an indenture, and begin in these words, *Hæc indentura, &c.* yet if it be not actually indented it is no indenture. And on the other side, if it be not so called, or these words be omitted, yet if it be indented, it is an indenture. And this was anciently called *Charta chyrographata vel communis*, because each party had his part (1). The deed poll is that which is plaine without any indenting, when the parchment or paper is polled or cut even. And this was anciently called *charta de una parte* (2). And this is single and but one, which the feoffee, grantee, or lessee, for the most part hath. The deed indented is also sometimes bipartite, *i. e.* of two parts, when there are two parties and two parts of the deed. And then commonly the feoffor, grantor, or lessor, hath the one part, and the feoffee, grantee, or lessee, the other part. And sometimes it is tripartite, *i. e.* when there are three parties and three parts, and then commonly each party hath a part of the indenture. And sometimes it is quadripartite, &c. And according to the parts they doe seale interchangeably one to another. And amongst these parts the part sealed by the feoffor, grantor, or lessor, is said to be the principall or originall, and the rest are called but accessory, counterparts or copies; and yet all of them in law doe make up but one entire deed. These deeds also are sometimes \* in the first person, as *Noveritis, &c. me A. B. &c. dedi & concessi, &c.* And albeit it be an indenture so made, yet it is good enough. And sometimes they are made in the third person, as *Hæc indentura testatur, &c. quod idem A. B. &c. dedit & concessit &c.* † The deed poll is usually made in the first person; but if it be made in the third person it is good enough. There are divers other distinctions of deeds: for some are publique that doe concerne countries, some of the prince. And some are private between particular persons, and those private persons or subjects. And these onely are intended here.

2. Quatuorplex.  
Indenture.  
Deed poll.

Counterparts.

\* P. 51.

lit. Sect.  
371. 372.

Bro. Oblig.

Co. super  
lit. 35. 36.

West Symb.  
part 1.  
lit. 46.

(1) As to the antient use of deeds indented, see *Mad. Form. Angl. Differt.* p. 28, and further 2 *Bl. Com.* 295. *Com. Dig. Fait.* (C. 1.)

(2) See distinction between *carta* and *factum*, *Co. Lit.* 9. A charter doth touch the inheritance, but a deed doth not, unless it hath some other addition. See further note 1. to *Co. Lit.* 96. 13th edition, and *Lit.* 171. b.

And of these some are absolute, and some conditionall: some are inrolled, and some not inrolled: some concern the realty, and some the personalty: and some are mixt. And some of these also contain matter of grant, or gift; amongst which, feoffments, gifts, bargaines and sales, grants, and leases are the chiefe. And some of them containe matter of discharge, as releases, acquittances, and defeasances, and such like. And some of them contain other matter, as confirmations, and such like. Or, as others distinguish, some of them are constitutive and making, and some are remissory or liberatory. And the first sort are, some of them creating, *i. e.* such whereby any estate, property, or obligation, not having essence before, is newly raised and created, as the first grant of a rent, common, way, &c. estate taile, for life, years, &c. And some of them are conveying, *i. e.* such by which estates, properties, and the like being already created, are conveyed to others, as feoffments, bargaines and sales, grants over or assignments, surrenders and the like. Those that are of the last sort, are such as do describe and testifie some precedent contract for a duty or fact, to be paid, performed or done, released or discharged; of which sort are all acquittances, releases, and other such like matters of discharge.

Note.

But here by the way, two things are to be observed. 1. That there may be, and are, divers other kinde of deeds besides those which are named before; for every agreement put in writing, sealed and delivered, becometh a deed. And attornments, exchanges, surrenders, partitions, authorities, commissions, licences, revocations, and the like, are usually made, given, done and granted by deed. And there are divers other instruments concerning merchants and other affaires; if therefore any of these be done by deed, such a deed is for the most part subject to the rules or deeds herein laid down. 2. Albeit that feoffments, gifts, bargains, leases, attornments, exchanges, surrenders, and such like things, may in divers cases be as well made and done without as with a deed, yet if a man will make his claime to any thing given or granted by such feoffment, gift, &c. by deed, the deed must be such a deed as is a good and perfect deed by the rules herein after laid down.

\* P. 52.  
3. The parts  
of a deed.

\* In every deed or writing there are two parts considerable: 1. Co. super Lit. 6. 229.  
the externall or materiall part; *i. e.* the parchment or paper, wax and writing: 2. the internall or intellectual part; *i. e.* the sense, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers deeds, as feoffments, grants, leases and the like, there are certain formall or orderly parts, which make up the whole, of which the law doth take speciall notice; as, 1. The premisses, the office whereof is to rightly set down the name of the feoffor, grantor, lessor, &c. feoffee, grantee, lessee, &c. and to comprehend the certainty of the thing granted or leased. And herein in some deeds there is also a recital of some things, and in some deeds an exception of some part of the thing granted before by the deed. 2. The *Habendum*, the office whereof is to name again the feoffee, lessee, &c. and to set forth what estate he shall have, and for what time he shall hold the thing given or granted. 3. There is set down and expressed upon what terms and conditions the estate of the thing granted shall be held. And therefore there is sometimes contained therein a *Tenendum*, to set forth by what tenure the grantee

How, 134.  
H. 6. 2.  
Lit.  
370.  
H. 6. 35.  
H. 6. 34.

H. 7.  
per  
Brian.

Lit. Sect.  
373.

Finche's  
law 109.

How, 434.  
411.

(1) The ten-  
ten-  
burgess, i.  
and common  
(2) See mo-  
Wood 236.  
(3) The inc-  
and wh-  
and the other  
bearing it. C



grantee shall hold the land granted (1) 4. A reservation or *redendum*, to set forth by what rent he shall hold the land. 5. A condition. 6. A warranty. 7. Covenants. 8. The conclusion after this manner, *In cujus rei testimonium, &c.* wherein is set forth the date of the deed, containing the day, month and year, and the stile of the king or year of our Lord. And all these are sometimes contained under the premisses and the *Habendum* (2).

All the parts of a deed indented in judgement of law doe make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutuall deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party. And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they doe more properly belong to him: for every word that is doubtfull shall be applied and expounded to be spoken by him to whom they will best agree according to the intent of the parties; and they shall not be taken more strongly against one, or beneficially for the other, as the words of a deed poll shall. † If therefore *A.* by indenture enfeoffe *B.* upon condition, and then doth enter for the condition broken; in this case it hath been held, that *A.* in his pleading may shew forth the deed that he himselfe sealed, and that this is sufficient. And therefore also it is thought, that an indenture made in the first person, is as good in law, as an indenture made in the third person, when both parties \* have to this put their seales; for if in an indenture made in the third person, or in the first person, mention be made, that the grantor only hath put his seale and not the grantee, then is the indenture only the deed of the grantor; but when mention is made that the grantee also hath put his seale to the indenture, it shall be said to be the deed of them both (3).

And although both parts of the indenture are but as one deed, yet the part of the grantor is as the principall, and the other is not but a counter-part. And therefore if the lessor only seale and not the lessee, yet it is as good as if both had sealed; and if there be any difference between the parts, the counter-part shall be made to agree with the principall, and it shall be deemed the misprision of the clerk.

This deed is the strongest kind of deed of the two; for this worketh an estoppel, *i. e.* doth barre and conclude either party to say or except any thing against any thing contained in it. For if a lease be by indenture, both parties are concluded to say, that the lessor had nothing in the land at the time of the lease made; so that if the lessor happen to have the land after by purchase or descent, the lessee may enter upon him by way of conclusion, and the lessee by estoppel shall be forced to pay his rent. But it is otherwise of a deed poll, for this is commonly but of one part,

4. Thenature of a deed indented, and a deed poll, with the difference that is between them.

\* P. 53.

(1) The *tenendum* is now of very little use, being only inserted by custom; it was formerly used to signify the tenure by which the estate granted was to be holden, *viz. tenendum per servitium militare, in burgagio, in libero socagio, &c.* but all these being reduced by the statute 12 *Cur. 2. c. 24.* into free and common socage, the tenure is now never specified.

(2) See more fully as to the parts of a deed, *Wood's Inst.* 224. *Noy's Max.* 54. 2 *Bl. Com.* 298. *Wood* 236.

(3) The indenture in the third person is the most sure, because it is most commonly used. *Co. Lit.* 119. b. and where a deed is made between two parties, and one of them doth seal and deliver his part, and the other doth not, yet the deed so sealed and delivered is good to charge the person sealing and delivering it. *Cro. Eliz.* 212.

which is sealed by the feoffor, lessor, &c. only. And this shall be expounded to be the sole deed of the feoffor, lessor, &c. and the words therein contained shall be said to be his words, and shall bind him only, and be expounded altogether in advantage of the feoffee, lessee, &c. and against the feoffor, lessor, &c. and this doth not work any estoppel against either party (1). But if a deed be indented or poll, and there be therein reciprocal covenants between them from one to another, albeit there be but one part, yet if each of them seale it and deliver it the one to the other, this is good for both parties; and each of them, that can get the deed into his hand to shew or plead, may take advantage thereof against the other. And in this case the deed is usually kept by one indifferent between them both.

Trin. 38 El.  
Co. B. per  
Curiam.  
Co. super  
Lit. 143.

5 When and where a deed shall be said to be good and sufficient. And when and where not, but void or voidable *ab initio*.

\* P. 54. A vacat of a deed. Things requisite to make a deed good.

Note here first of all, that some deeds are void from the beginning, and do never take effect; and amongst these some are absolutely void against all persons, and some are void only to some purposes, and against some persons. Some also that are not void from the beginning are, notwithstanding, voidable, and that sometimes by the party himself that made them, or any others, and sometimes by others, and not by himselfe. And some deeds are good in their first creation and well made at the first, but become void by some matter *ex post facto* (2). And this may be either by an extrajudicial act, as rasure, or the like, or by a judicial act, *i. e.* when by the sentence of a court a deed is damned and made void, which is called a vacat of the deed.

See Grant infra.

To the making of every good deed containing any agreement, these things are requisite. 1. Writing: *i. e.* That it be written in parchment or paper; and that the agreement be legally and formally set down, and be sufficient in law for the composition and frame of the words. And this is called the legall part, the judgement whereof belongeth to the judges of the law. 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names (3). 3. Reading: *i. e.* That if it be an illiterate man that is to seale the deed, and he desire to heare it read, that it be truly read, or the contents thereof truly declared to him. 4. Sealing: *i. e.* That the deed so written, be sealed by the party or some other by his appointment, for a further testimony of his consent thereunto. 5. Delivery: *i. e.* That the deed so written and sealed be delivered by the party or some other by his appointment as his deed. And these last things being matters of fact are to be tryed by jurors. 6. That the ground, foundation, end, and purpose of making the deed be good and not against the law. Otherwise in most of these cases the deed is void *ab initio*. Also in some cases to perfect the contract, and make the conveyance of the thing intended to be passed thereby good, some other ceremonies or complements are requisite, as inrollment, livery of seisin, attornment; otherwise the deed in part at least becometh fruitlesse and vaine.

Co. super  
Lit. 225.  
35. 36.  
Co. 2. 4. 5.

Perk. sect.  
149. 137.

See infra.

See infra.

Perk. sect.  
137. &c.

See infra.

(1) *Sed quere* as to the feoffor and lessor. In *Co. Lit.* 47. b. it is said, if the lease be made by deed indented, then are both parties concluded; but if it be by deed poll, the lessee shall not be estopped to say that the lessor had nothing at the time of the lease made; whereby it seems to be implied that the lessor shall be estopped.

(2) And some that at the time of making are voidable, may be made good by some after act, as *seoffment by husband and wife of wife's land rendering rent, the husband dies, the wife accepts the rent* this shall bind her. 2 *Brownl.* 141. *Cro. Eliz.* 749.

(3) What is a sufficient name or description of the parties to a deed, see *Bar. Abr.* Grant (C).

Perk.  
Sect. 116.  
Co. super  
Lit. 171.

2] Co. su  
Lit. 229.  
F. N. B. 1  
27 H. 6.  
Co. 2.

Perk.  
Sect. 123.  
Perk.  
Sect. 155.  
Co. super  
Lit. 225.

3] Co. su  
Lit. 225.

Fitz. Fait  
& seoff-  
ments, 5.  
Dyer 6.

Co. 5. 121.  
10. 133.  
See Oblig.  
Numb. 3.

Co. super  
Lit. 6.

(1) Wo  
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ation, that  
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For a deed may be void, either for that the writing is not in parchment or paper; or being so, is not legally and formally drawn; or being so, there doth want a person able to give, or make, or capable to have, or take, or a thing to be contracted for; or if so, for that it is not duly sealed and delivered; or if so, for that it is not truly read at the time of the sealing and delivery; or if so, for that it is made void by some special law, as being made upon an usurious contract, by duress, or the like. Or it may at least in part lose its force afterwards by neglect of inrollment, livery of seisin, or attornment, in cases where these things are requisite.

Every deed well made must be written. *i. e.* The agreement must be all written before the sealing and delivery of it: for if a man seale and deliver an empty piece of paper or parchment, albeit he doe therewithall give commandement that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed. 2. This writing must be in paper or parchment, for if an agreement be written on a piece of wood, linnen, the barke of a tree, a stone, or the like, and this be sealed and delivered; this is no good deed (1). <sup>b</sup> But it may be written in \* any language, or in any hand. And therefore it is held that a deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a deed written in English and in a Secretary hand. <sup>c</sup> And albeit the writing be beside the lines, or the lines be written crooked, yet this will not hurt the deed. <sup>d</sup> And if there be any alteration, rasure, or enterlining made in any part of the deed before the delivery of it; this will not hurt the deed. But in such cases it is policy to make a *Memorandum* of it upon the back of the deed, and to give the witnesses notice of it; for otherwise if it be in any place materiall, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and especially if it be in a deed poll, the deed is greatly suspicious. 3. The matter written, must be legall and orderly for manner and matter. *i. e.* There must be words sufficient to set forth the agreement and bind the parties; for a deed may be void and lose its virtue in all, or part, for repugnancy, uncertainty, and divers other matters: (whereof see in exposition of deeds *infra*.) But it is not materiall whether the deed be in the first, or in the third person so as the words be aptly applied. For if a deed poll be in the third person, *viz. Quod presens scriptum testatur &c. quod idem A. dedit & tralidit, &c.* Or an obligation be in the third person, *viz. Md. quod I. S. debet I. D. 201. &c.* these are good deeds notwithstanding the statute of 38 E. 3. cap. 4. which is meant onely of obligations made beyond the seas. So if the words of a deed indented, run in the first person, it is as good as if it were in the third person. Neither is it necessary that the English or Latine, whereby it is made, be true and congruous; for false and incongruous Latine or English *selldome* or never hurteth a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* Neither is it necessary that every deed have all the

(1) Wood or stone may be more durable, and linnen less liable to erasures, but writing on paper or parchment unites in itself, more perfectly than any ether way, both those desirable qualities, for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable — A deed must have the regular stamps imposed on it by the several statutes for that purpose, otherwise it cannot be given in evidence. 2 Bl. Com. 297.



parts of a deed before set down, as premisses, *Habendum, &c.* for a deed may be good without *Habendum*, warranty, reservation, or covenant. And a deed is good, albeit these words in the close thereof, *In cujus rei testimonium sigillum meum apposui*, be omitted; and albeit there be no mention made in the same that the deed was sealed, and delivered; so as in truth it be duly sealed and delivered, and the sealing and delivery can be proved. Also a deed is good; albeit it mention no time or place of date or making, or have a false date, *i. e.* be dated at one time and delivered at another; and albeit it have an impossible date, as the 30th of February, or the like, for antiently until the time of E. 2. and E. 3. the deeds had no date; because the law was then held to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date, must set forth the time when it was delivered (1).

\* P. 56.

2. In respect of the persons parties thereunto and matter therein.

\* The second thing required in every well made deed is, that the person making it be able to give, grant, make, or doe the thing contained in it; that the person to whom it is made be capable of the thing to be given, granted, made or done thereby; for if it be made by, or to any such persons as are disabled, as infants, aliens, women covert, persons attainted of treason or felony, idiots, and such like, it will be void in all or part (2). But any person naturall, male or female, or politique, as sole corporations, or corporations aggregate of many, ecclesiasticall or temporall, not disabled by law, may give or take by deed. Also there must be some matter, whereabout the contract may be conversant. It is therefore said, that in every grant there must be grantor, grantee, and a thing to be granted, and in every obligation an obligor, obligee, and thing to which the obligor is bound; and so of scoffments and other deeds.

3. In respect of the reading of it.

The third thing required in every well made deed is, That if the party that is to seale it be a blind or an illiterate man, and desire to heare it read, that it be so; for if such a man be to seale a deed, and he desire to heare it, or to heare the contents of it read or declared to him first, and it be not done, and he afterwards seale and deliver it, this is no good deed. So if upon or without any such request made by him that is to seale and deliver it, the party himself to whom it is made, or a stranger, shall read the deed, or declare the contents thereof, falsly and otherwise than in truth it is, the deed will be voyd, at least for so much as is so misread or misdeclared. But if the party himself that is to seale and deliver it, before the sealing and delivery thereof cause another that is a stranger covinously to read it, or to declare the contents thereof falsly to him, and otherwise than it is, of purpose to make the deed void, this will not hurt the deed. So if the party that is to seale the deed, can read himself and doth not, or being an illiterate or a blind man, doth not require to heare the deed read, or the contents thereof declared, in these cases albeit the deed be contrary to his minde, yet it is good and unavoydable.

(1) See accordingly *Dodson v Kayes*, *Yelv* 193. If two deeds bear date the same day, and are manifestly but one agreement, that shall be presumed to be executed first, which shall support the clear intent of the parties, *Twyer v Horde*, 1 Burr. 106.

(2) Or voidable, for deeds executed by infants are sometimes void, and sometimes voidable, see *Perkins* § 12. Co. Litt. 2. b. 380. b. ante p. 7. note 1. Bac. Abr. Grant (A. 3) Com. Dig. Infant (C. 2), but deeds by females covert are said to be always void. Co. Litt. 42. b. 13th Edit. note 4. see further as to deeds by o. to the several persons mentioned in the text. 2 Bl. Com. 250. Vin. Abr. Fairs (F. a), Grant (H. a. 12.) 2 Aik. 398.

Terms of the law. Fairs. Co. super Lit. 225. Co. 2. 4. Perk. Sect. 129.

Co. 2. 5. Dyer 19. Kelw. 70.

Co. 2. 5. 117. Dyer 28. Perk. Sect. 120. Co. super Lit. 6.

Perk. Sect. 130. 131. 134.

Co. 11. 79. Plow. 559. Perk. Sect. 1. 119. See Grant. infra. Numb. 4. Peoffment infra. Numb. 12.

Perk. Sect. 130. 131. 132.

Perk. Sect. 134.

Co. 2. 4. Perk. Sect. 137. 9. H. 67.

Perk. Sect. 137. 9. H. 67. Co. 11. 28. 3. 35. 47. E. 3. 3.

(1) And grants of land as fealing, (2) See

Terms of  
the law.

Fait. Co.

Super

Lit. 225.

Co. 2. 4. 5.

Perk.

Sect. 129.

Perk. Sect.

130. 131.

134.

Perk. Sect.

130. 131.

134.

Perk. Sect.

134.

Co. 2. 4. 5.

Perk. Sect.

137. 9. H. 6.

57.

Perk. Sect.

137. 9. H. 6.

57. Co. 11.

28. 3. 35.

47 E. 3. 3.

The fourth thing required in every well made deed is, that it be sealed: but this sealing of deeds in times past was not used, for the Saxons used only to subscribe their names, and to adde the signe of the crosse, and to set down a great number of witneses (1). And afterwards the Normans brought in with them the sealing of deeds but by degrees; for first the Kings and a few of the nobility used it, and to seale with their seales of arms; afterwards all the nobility used it, and then the gentlemen, and about the time of E. 3, all men began to use sealing of deeds, which hath been continued ever since, so that now it is of necessity, in so much that if a deed be never so well written before and delivered afterwards, yet if it be \* not sealed between the writing and delivery, it is not a good deed. But if a stranger seale it by the allowance or commandement precedent, or agreement subsequent, of him that is to seal it, before the delivery of it, it is as well as if the party to the deed did seale it himselfe. And therefore if another man seal a deed of mine, and I take it up after it is sealed and deliver it as my deed; this is said to be a good agreement to, and allowance of the sealing, and so a good deed. And if the party seal the deed with any seal besides his own, or with a stick, or any such like thing which doth make a print, it is good. And although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse. And if there be twenty to seal one deed, and they seal all upon one piece of wax and with one seal, yet if they make distinct and severall prints; this is a very sufficient sealing, and the deed is good enough (2).

4 In respect  
of the seal-  
ing of it.

\* P. 57.

The fifth thing required in every well made deed is, That there be a delivery of it. And for this it must be known, that delivery is either actuall, *i. e.* by doing something and saying nothing, or else verball, *i. e.* by saying something and doing nothing, or it may be by both: And either of these may make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himselfe, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, untill it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *omnis ratihabitio mandato æquiparatur*. And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed, as if it were delivered by the party himself: but if he do not pursue his authority, then it is otherwise. And therefore if a deed, or the contents thereof, be read or declared to a man that is to seal it; and he (being illiterate) doth deliver it to a stranger, and bid him examine it; and if it be so as it was read to him, then to deliver it as his deed, otherwise to redeliver it to him again that made it; in this case if the deed be, in truth, otherwise than it was read, and yet notwithstanding he, to whom it was delivered, doth

5 In respect  
of the deli-  
very of it,  
and what  
shall be said  
a good deli-  
very, or not.  
1. In respect  
of the per-  
son that  
doth make  
it.

(1) And the statute 29 Car. 2. c. 3 revives the Saxon custom of *signing*, and expressly directs it in all grants of lands, and many other species of deeds; in which therefore signing seems now to be as necessary as sealing, though it has been held sometimes that the one includes the other. 2 B. Com. 306.

(2) See further as to the sealing of deeds, *Cam. Dig. Fait (A. 2)*. *Roll. Abr. Fait (H)*.

deliver

deliver it to him, to whom it is made, this delivery shall not avail, neither is the deed by this delivery become a good deed (1).

2. In respect of him to whom it is made.

\* P. 58.

3 In respect of the time.

4. In respect of the manner and order of delivery.

As an Escrow, *Quid*.

And so also a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him: or it may be delivered to any stranger for, and in the behalf, and to the use of, him to whom it is made, without authority. But if it be delivered \* to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery. And yet if an obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made; this is said to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be sealed it is nothing worth (2). And where it is delivered before the date, yet in the pleading of it, it must not be so set forth.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery: so if I take the deed in my hand and use these or the like words; here take it, or this will serve, or I deliver this as my deed, or I deliver it to you, these are good deliveries. So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of seisin of the land; this is a good delivery. So if the deed be sealed and lying in a window, or on a table, and I use these or the like words, there it is, take it as my deed; this is a good delivery and doth perfect the deed; for as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words (3). But if a man seale and acknowledge before a Major, or other officer appointed for that purpose, a writing provided for a statute or recognisance, this acknowledgment before such an officer shall not amount to a delivery of the deed so as to make it a good obligation, if it happen not to be a good statute or recognisance (4).

The delivery of a deed as an escrow is said to be where one doth make and seale a deed and deliver it unto a stranger untill certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made (5). The words therefore that are used in the delivery must be after

Dyer 167.  
Perk. Sed.  
137. 8H. 26.  
Co. super  
Lit. 36. 3.  
26. 5. 119.  
10 H. 6. 25.  
13 H. 4. 8.  
Dyer 192.

Co. 2. 4.  
Plow. 492.

Co. 9. 137.  
Dyer 192.  
167. Co. super  
Lit. 36.  
49. 35. Ail.  
pl. 6.

Adjudged  
Trin. 37. 21.  
B. R.

19 H. 8.  
Kelw. 88.  
14 H. 8. 22.  
14 H. 6. 44.  
Perk. Sed.  
140. 141.  
142. 138.  
143. 144.  
Fitz. Peoff.  
ments &  
Fait. 4. 13.  
15. Co. 9.  
137. super  
Lit. 48. 36.

(1) What shall be deemed a good delivery, see *Vin. Abr. Fait* (1). *Com. Dig. Fait* (A. 3).

(2) A deed takes effect by the delivery, and it is not material whether the delivery be before, or after the date; if it is delivered before the date, and one of the parties dies before the date, yet the deed is good; for tho' the party is stopped to plead the deed to be delivered before the date, yet the jury may say the truth. 2 Co. 4. b.

(3) But if a man throws a writing on a table and says nothing, and the party takes it, this does not amount to a delivery, unless it be found to have been put there with intent to be delivered to the party. *Qw* 95. 1 *Leen*. 140. And if a patron draws a presentation in writing, and puts his seal to it, and seales it in his stud, and the party for whom it is, gets it without the privity or licence of the patron, and brings it to the bishop, and is thereupon instituted and inducted, yet it is all void. *Telw*. 7.

(4) Debt may be brought upon a statute staple, or merchant; for the words "*obligari et teneri*" make it an obligation, altho' it be not a statute to some intent; and by delivery of the party it is an obligation but not a statute, until the mayor's hand be put to it. *Cro. Eliz.* 356.

(5) See accordingly *Whyddon's case*, *Cro. Eliz.* 520. *ibid.* 835, 884.

e Fitz. P.  
& Peoff.  
ments 1

f Idem.

g Co. 3.

Co 5. 84  
36.

Co 3 35



this manner: I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you 20*l*. for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep untill such a day, &c. upon condition that if before this day he to whom the escrow is made shall pay to me 10*l*. or give to me a horse, or infeoffe me of the manor of Dale, or perform any other condition, that then you shall deliver this escrow to him as my deed. For if when I shall deliver the deed to the stranger, I shall use these \* or the like words: I deliver this to you as my \* P. 59. deed, and that you shall deliver it to the party upon certain conditions: or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions. So it must be delivered to a stranger; for if I seale my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for, *In traditionibus chartarum non quod dictum sed quod factum est inspicitur*. \* But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force untill the conditions be performed, than if I had made it, and layd it by me, and not delivered it at all; and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. † But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, ‡ and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore, that is trusted with the keeping and delivery of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life time of the parties; & *postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery, is but the execution and consummation of the first delivery. And therefore if an infant, or woman covert deliver, a deed as an escrow to a stranger, and before the conditions are performed, the infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed,

e Fitz. Faits  
& Feoff-  
ments 13.

f Idem.

g Co. 3. 35.

Co. 5. 84. 3.  
36.

Co. 3. 35. 36.

Relation.

\* P. 60.  
Double  
delivery.

deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not (1).

See infra at

Numb. 8.

\* In case where a deed is merely void, and doth take no effect by the first delivery, as where a woman covert doth seal and deliver a deed or the like, and she after, being sole, after her husband's death, doth deliver the deed again, in this case the deed is become good. So where a deed originally good, doth become void by matter *ex post facto*, as by breaking the seal, or the like; if the party to the deed seal and deliver it again, by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the first delivery doth take any effect at all the second delivery is void.

Perk. Sect.

154. 11 H.

6. 27.

<sup>b</sup> And therefore it is held that if an infant, or a man by duress<sup>b</sup> of imprisonment, do make, seal, and deliver a deed, &c. (in which cases the deed is not void but voidable)<sup>i</sup> and after the infant being of full age, or the man imprisoned being at large, do deliver this deed again the second time; this second delivery is void:

Perk. Sect.

154.

<sup>i</sup> Co. 5. 119.

*Debile fundamentum fallit opus* (2). So if a man be disseised, and make a lease for years in writing, and delivered the deed, and after deliver it upon the ground, this second delivery is void, for the first delivery made it his deed; but if he had delivered it as an escrow, to be delivered as his deed upon the ground, this had been a good second delivery.

Co. super

Lit. 48.

Subscribing  
of the par-  
ties name  
or mark not  
necessarie.

And by all this that hath been said it appeareth, that the putting to, or subscribing of the parties name or make to the deed he is to seal, is not essentiall; for a deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered (3). But it is the best and surest way notwithstanding, to have the name or mark of the party subscribed, for by this means the deed may be the better proved when the witnesses are dead (4).

New.

Terms of

the law tit.

Fait. 9. Jac.

Scot's case.

Note.

Note here that albeit a writing or escrow, that is not sealed and delivered in manner as aforesaid, may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proof of the agreement contained therein. And whatsoever may be done by word without any writing, may much more and better be done by writing unsealed, or sealed, though it be not delivered as aforesaid.

6. In respect  
of the  
ground and  
end of it.

And the last thing required in every well made deed is, that it have a good foundation, and be to a good end; for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, sealed, and delivered, yet it may be void, or at least voidable, for other causes; as when it is either unjustly gotten and obtained, or corruptly in pursuit and execution of some dishonest agreement, or to a dishonest end or purpose made. A deed therefore whether it be a feoffment, gift, grant, lease, release, confirmation, or obligation, that is made or obtained by *menace* or

Co. 2. 9.

Perk. Sect.

16 Dyer

143. 45 E.

3. 6.

*Menace* or  
*Duress*.  
*Quid.*

*duress*, *i. e.* when one doth threaten another to kill or maim

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(2) See accordingly *Bro. Abr. Fairs, pl. 28.* where the first delivery is void, the second shall aid it; but if the first delivery was voidable only as by an infant, or person under duress, it shall not be made good by a redelivery at full age, or when at large. See further as to double delivery, and in what cases necessary, *Vin. Abr. Fait (N). Roll. Abr. Fait (N).*

(3) See ante p. 55. note 1, as to the necessity of the deed being signed by the party under the stat. 29 Car. 2. c. 3.

(4) With respect to the attestation of witnesses to the execution of a deed, see 2 *Bl. Com.* 307, 378. 2 *Infr.* 78.

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him, if he will \* not make him such a deed ; or doth imprison \* P. 61.  
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Bro. Dureffe  
in 1010, 9H.  
7. 25. 21 E.  
4. 13.

to whom it is made. In which matter these things must be ob-  
served: 1. That there must be some threatning of life or member,  
or of imprisonment ; or some imprisonment or beating it selfe ;  
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or the taking and keeping of a man's goods, or the like, this will  
not make the deed made upon that occasion to be *per duresse*.  
2. It must be a threatning, beating or imprisonment of the party  
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threatning, beating or imprisonment of any other besides the par-  
ty himself that doth make the deed, or his wife, this will not make  
the deed to be by *duresse*. 3. The threatning, beating, or impris-  
onment, must be to this end ; and hereupon the deed must be  
made ; for otherwise the deed shall not be said to be by *duresse*.  
As for examples: If four do threaten one to imprison him, if he  
will not seale a deed to one of them four, and he do so ; this deed  
shall be said to be gotten by *duresse*, and therefore void. And if  
one threaten a man to kill him unlesse he will seale a deed to him  
and three others, and he do so ; this is void as to all the foure.  
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seale a deed to a stranger, and thereupon he do so ; this is void as  
if it were to the party himself. If one threaten to kill, wound, or  
imprison me, to make me swear or promise to seale him such a  
deed, or imprison me untill I do so ; and afterwards at another  
time and in another place, when I am at liberty, I do it accord-  
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in prison at one man's suit, and then another man doth cause me  
to be used more severely in prison, to compel me to make him  
some deed, which I do thereupon make to him ; this deed shall be  
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But if I be imprisoned at one man's suit, (be the cause just or  
not,) and being in prison I make an obligation or any other deed  
to a third man ; this shall not be said to be by *duresse*, but is a  
good deed. So if one threaten me to take away my goods, burn  
or break my house, enter upon my land, kill or wound my father,  
or mother, brother, or sister, or friend, or do imprison any of  
them, and thereupon I seale a deed ; this is good and shall bind  
me (2). So if one distrain my beasts, to compell me to seale a  
deed, and will not deliver them unlesse I do so, and threaten me  
that if I take the beasts again and not seale the deed he will  
kill me, and thereupon I seale the deed ; this is a good deed and  
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(1) A man cannot plead *non est factum* to a deed obtained by duresse ; for it is his deed at the time of  
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Relation.

\* P. 60.  
Double  
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Menace or  
Dureſſe.  
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7. 25. 21 E.  
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But if I be imprisoned at one man's suit, (be the cause just or  
not,) and being in prison I make an obligation or any other deed  
to a third man ; this shall not be said to be by *dureffe*, but is a  
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or break my house, enter upon my land, kill or wound my father,  
or mother, brother, or sister, or friend, or do imprison any of  
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me (2). So if one distrain my beasts, to compell me to seale a  
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in proportion to the injury done him ; 2 Inst. 483. Perk. § 18.

\* P. 62.

prison, or under arrest, I make an obligation, feoffment, or any other deed to him at whose suit I \* am arrested, for my enlargement and to make him satisfaction; this shall not be said to be by duress, but is good and shall bind me. And therefore if auditors in an account do commit an accomptant to prison, and then he make an obligation to his master for the arrearages, this is good (1). And if one in prison for felony grant a reversion of land to another, to help him out of his trouble, this is a good grant (2). If A. and B. enter into an obligation upon the threatening of B. only, this is a good obligation by A. that was not threatened (3).

Estoppel.

And if one make an obligation by duress, and after being at large take a defeasance upon it, this makes the obligation good again, and the obligee is concluded to say it was by duress. Bro. Defeasance 17.

Usury.  
Quid.

A deed also made upon or in pursuit and execution of an usurious contract, i. e. such a contract, as whereupon the lender is sure to have in money, or monies worth, for the loan of the thing, above the principal, more than after the rate of 8l. for the 100l. by the year, also is void. In which matter these cases are to be observed. If one 6. Decembris borrow 30l. untill the second day of June next following, to pay then for it 33l. for the principal loan, if the sonne of the obligee be then alive; and if he die before that time, that then he shall pay but 27l. which is lesse than the principal; in this case the contract is usurious and corrupt, and therefore the deed that doth contain it is void (4).

If one borrow 100l. and for this mortgage land above the value of 8l. by the year, on condition that if the mortgagor pay the money at the years end, that the estate shall cease; this is an usurious contract, and therefore the deed, whether it be a deed of feoffment, grant, or lease containing it, is void (5). So if I lend another man 10l. for a year, and take security by statute or obligation that the borrower pay me the lender 20l. for it; this contract is usurious, and therefore the statute and obligation void. But if the agreement and statute or obligation be that if the borrower pay not the 10l. within the year, that then he shall pay 20l. for it; this is no usury, and therefore in this case the deed is good. If one come to me to borrow 500l. of me, and tell me he is unable to pay it together, and therefore he desires he may pay it in twelve or thirteen years, and doth offer therefore to give me for my kindness 200l. over and above besides the use to let him have it so, and then the 500l. the interest, and the 200l. is cast together, and so we agree upon an annuity of 80l. per annum for fourteen years, which is assured by conveyances unto me; in this case the contract is usurious, and all the assurances made to perfect it are void. And yet regularly, where the principal money is lost, the contract

Term of the law.  
Co. 5. 70.  
37. H. 8.  
chap. 9.  
39 El. c. 18.  
21 Jac. ch. 17.  
13. El. ch. 8.

Corflet's case.  
Pasch. 7.  
Jac. B. R.

Curia Hill.  
14. Ja. B. R.  
Saunders's

(1) Debt upon arrearages of account, defendant shewed that before the account, plaintiff of his own wrong did imprison defendant, and assigned auditors to him in prison, and so the account was made by duress; plea held good, and judgment accordingly for defendant. 1 Leon. Rep. 13.

(2) But this should be before conviction; for after, the reversion is forfeited. 1 Wood 803.

(3) And it is not avoidable by A. tho' it is by B; for it is said, that no one shall avoid his own bond for the imprisonment or danger of any other than of himself. Cro. Jac. 187, Huscombe v. Standing.

(4) See accordingly the case of Reynolds v. Clayton. Mo. Rep. 397. S. C. in 2 And. 15. and further in Fin. Abr. Usury (G).

(5) This case seems to be upon the presumption that the mortgagee receives the whole profit of the mortgaged premises, or so much thereof as would exceed 8l. per cent. per annum.

Co. 5. 6

Hill. 7 J.  
B. R. Cu

Bro. Obligation 79

Per Just.  
Brigman,  
Hill. 7 CarStat. 27 J.  
ch. 4. Co.  
super Lit.  
stat. 39 El.  
ch. 18.

(1) Wh  
21 Jac. 1.  
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2 Burr. 80  
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is not usurious. If a man desire to borrow of me 100*l.* for a year, and I am content to let him have it for the use of 8*l.* \* but withall \* P. 63.  
I compell him to take a lease of me of a house at 60*l.* rent, which in truth is worth but 30*l.* this contract is usurious, and therefore the assurances thereupon made, are void. *Et sic de similibus.* But  
Co. 5. 69. if a man the 17th of July 1579. grant me a rent of 20*l.* per annum for the lone of 100*l.* to be paid every half year, and the first payment at Christmaffe 1580. and it is agreed between us, that if he pay the 100*l.* the 17th of July, 1580. that then the rent shall cease; this contract is not usurious; and therefore the assurances, thereupon made, are not void, but good. But if in this case there be a private or collaterall agreement between us, that he shall not pay the 100*l.* and redeem the rent, and that clause be put in only to evade the statute, then is the contract usurious notwithstanding, and the deeds and assurances thereof void. *Et sic de similibus.* If  
Hill. 7 Jac. one borrow 100*l.* after the rate of 8*l.* per centum, and the borrower do afterwards pay part of the principall, and all the use, within the year; and the lender doth receive it, or the lender doth sue for his money within the year; these subsequent acts do not make the contract, or deeds or assurances, thereof, void, for it is a rule, that if the originall contract be not usurious, no matter *ex post facto* can make it so. If one borrow of me 10*l.* and bind himself to pay me by a day, and moreover bind himself that if he pay it not by the day, that he shall pay me 20*l.* for it; this contract, and the deed for perfection of it, are good; and this is not usurious, for all obligations with conditions, for payment of money lent, are of this nature. And yet if one borrow 100*l.* of me and for this mortgage land to me of a greater value then 8*l.* per annum, on condition that if he pay the money at any time before the years end, then the assurance to be void; this should seem to be an usurious contract; for in this case I am sure to have by the agreement more than after the rate of 8*l.* per centum, and so it is not in the last case before (1). If one borrow 100*l.* for a year, and give the broker 20*l.* to procure it; this will not make the contract usurious, nor the assurances void: but for this the broker may be punished (2).  
Per Just. Brigman, Hill. 7 Car. 1.

Also all obligations, made to a sheriffe, contrary to the statute of 23 H. 6. ch. 10. are void or at least voidable by pleading. But of this see in obligations *infra*.

Obligations made to a sheriffe contrary to the statute.

Stat. 27 El. ch. 4. Co. super Lit. 3. stat. 39 El. ch. 18. A deed also made, containing the grant of any thing, with intent and of purpose to deceive and defraud one that shall afterwards buy the same thing, is void. For it is to this purpose provided by a statute law, that all fraudulent conveyances of land, or any rent or profit out of land, made by whomsoever, with intent

Collusion in fraudulent conveyances. 1. To deceive purchasers.

(1) When the former editions of this book were published, the rate of interest allowed by the statute 21 Jac. 1. c. 17. was 8*l.* per cent. per annum. which by the statute 12 Car. 2. c. 13. was reduced to 6*l.* per cent. and by 12 Ann. stat. 2. c. 16. to 5*l.* per cent. the utmost legal interest that can be now taken. See 13th Edit. Co. Lit. 4. a. Note 1.—The reasonableness of taking interest for the use of money, and the advantages arising from it to a commercial nation, are explained, in 2 Bl. Com. 455. For the doctrine of usury, what shall be deemed so, and the punishment for it, see Com. Dig. Bac. Abr. and Vin. Abr. tit. Usury, also the cases of the Earl of Chesterfield and others v. Janssen, 2 Vef. 125. 1 Atk. 301. Leyd v. Williams, 3 Will. Rep. 250. Murray v. Harding, ibid. 390.—Morisset v. King, 2 Burr. 891. Abrahams and Bunn. 4 vol. 2251. At what time interest shall commence on securities, legacies, &c. See Com. Dig. Chancery (3 S).

(2) By the statute 12 Car. 2. c. 13. § 3. (confirmed by 13 Car. 2. c. 14.) which inflicts a penalty of 20*l.* and imprisonment for half a year on scriveners, brokers, and others, who take more procuration money than five shillings for every 100*l.* for a year. The statute 17 Ges. 3. c. 26. §. 7. allows brokers to take 10*l.* for the loan of every 100*l.* advanced, as the consideration for an annuity.

\* P. 64.

to deceive or defeat any that shall purchase the land, or any rent or profit out of it, for money, or other good consideration, of the fruit and effect of their purchase, shall be void against such purchasers, for so much as they buy, and against all others that come in by or under them. But all such conveyances as are \* made *bonâ fide* and upon good consideration, are not to be accounted fraudulent (1). For the better understanding of which statute, Co. 3. 31. and the law in these cases, observe, that conveyances *bonâ fide* are opposed to such as are upon and with any trust expresse or implied: and good considerations are set down in the statute to distinguish from such as are not valuable, as nature, blood, and the like (2). If one convey land with a present or future power of revocation, or alteration, at his will that doth convey it; this shall be said a fraudulent conveyance, as against him that shall afterwards purchase this land. So that if one convey his land to the use of himself for life, and after to the use of divers of his blood, with a future power, as after the death of *H.* or after such a day to revoke it; and before the day he sell this land to a stranger for a valuable consideration; in this case, the first deed shall be said to be fraudulent and void, as to him that shall purchase the land, to do him any hurt (3). And if one convey land with such a power of revocation, and after, with an intent to defraud a purchaser, make a feoffment to a stranger to extinguish the power, and after sell the land for valuable consideration to a stranger; in this case both the first and the second deed, as to the purchaser, shall be said to be fraudulent, and therefore void. And if there be grandfather, Co. 6. 72. father, and son, and the grandfather makes a lease for 100 years to the father, and the father, to prevent the drowning of the lease by the descent of the reversion to him, doth assign over the lease to certain friends of his, to the use of his son an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land, and maketh estates, and doth all acts as owner of the land, the son payeth no debts, and the assignment (albeit divers persons of quality were named assignes) was delivered to one of the assignes of meane estate in private, and after the father doth sell the land for valuable consideration, in this case, this assignment shall be taken to be fraudulent and void as to the purchaser. And if the father make a fraudulent conveyance, and after continue the occupation of the land, and it descend to the son after the father's death, and he sell it for valuable consideration; in this case, the purchaser may avoid the conveyance made by the father, as well as if it had been made by the son himself, and that, whether the son be privy to the conveyance made by the father, or not. And if the fraudulent conveyance be made to the King, yet it is void as to a purchaser, as if it were made to a common person. And therefore if there be tenant in taile, the remainder in taile, or in fee, and he in the remainder, perceiving the

(1) Although they are concealed, or were secretly made, *Cro. Jac.* 455.

(2) Consideration of blood, or natural affection, is a good consideration: but not such a good consideration as is intended by the stat. of 27 *Eliz.* for a valuable consideration, as money, marriage, or the like, is the only good consideration within that act, 3 *Co.* 83. *b.* see further *Vin. Abr.* *iii.* Consideration.

(3) Every voluntary conveyance shall *prima facie* be deemed fraudulent as to a purchaser, 2 *Lev.* 147. 1 *Ca. Ch.* 100. 217: for a conveyance with a power of revocation is in the same degree as a conveyance by fraud, *Mo.* 618. see further, how a power of revocation shall make a deed fraudulent, and how it must be referred to be executed, to make it so, *Com. Dig.* *Covin* (B 3).

tenant

31.

M. 4 Jac.  
Cowell &  
Bart. case.

Per 2 Just.  
Hil. 18. Jac  
B. R.

83.

Co. 5. 60.  
Co. 3. 83.

73.

Co. super  
lit. 3.

tenant in tail doth intend to sell the land, and barre him by a common recovery, doth sell his remainder by deed inrolled to the King, and after the tenant in taile doth sell the land by common recovery for good consideration, in this case the \* purchafor shall avoid this deed to the King (1); whereby also it appeareth, that a fraudulent conveyance within this statute may be by way of bargain and sale. And so was it ruled by the Lord Chiefe Justice *Hide* in evidence to a jury at Guildhall, 3 *Car.* 1. And if there be a lease for years, and the lessor make a fraudulent conveyance in fee, and then for good consideration, maketh another lease to begin at the end of the former lease; this conveyance shall be void, as to the second lessee. And if *A.* make a lease to *B.* for years upon good consideration, and after he makes another lease to *C.* of the same thing, for the same term, to begin at the same time, upon good and valuable consideration, and *B.* doth not discover this, but drives this bargain with *C.* and is witnesse to this second lease, and the first lease is not excepted in the second lease; it seems in this case the first lease shall be void as to *C.* And in all these and such like cases, albeit the purchafor before he make his bargain have notice of the fraudulent conveyance, yet shall he avoid it as if he were ignorant of it (2). But such conveyances and deeds, made as before, shall never be said to be fraudulent and void, as against him that, shall have the thing afterwards, if he do not give a valuable consideration for it. And therefore if one make a lease, that would be fraudulent and void as to such a purchafor, to *A.* and after make another lease *bonâ fide* to *B.* but without any rent or fine given for it; in this case, the first lease shall not be said to be fraudulent, as against the second lessee, and therefore not void. So if one covenant for the advancement of his heirs males, &c. to levy a fine of land by a day, to the use of himself for life, and after of his issue male; and before the day he make a lease that is fraudulent for many years, of purpose, and after he doth levy a fine accordingly; in this case this lease is good, and shall not be said to be fraudulent and void by this statute, as against the issue in taile. So if a man that is somewhat foolish, and given to waste, be persuaded to settle his lands upon some of his friends, of purpose to maintain himself with it; and after some of his lewd companions inveigle him, and get him for a small sum of moneys to convey it to them; in this case, the conveyance, first made, shall not be said to be fraudulent, as against these purchasors; and therefore it is good against them (3). And if one, that hath a term for sixty years if he live so long, make it away, and then he doth forge a lease for ninety years absolutely; and after by indenture, reciting this forged lease, for valuable and good consideration doth bargain and sell this forged lease, and all his interest in the land to *I. S.* in

P. 65.

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(1) As being fraudulent within the statute 27 *Eliz.* the conveyance of the remainder to the king, being with intent to deceive a purchafor, is directly within the words and purview of that act, 11 *Co.* 74. b.  
(2) A purchafor for a valuable consideration shall hold against a prior voluntary settlement, though he had express notice thereof at the time of his purchase; such voluntary settlement being made void by 27 *Eliz.* against a purchafor, with, or without notice. *Per Cur. Abr. Eq. Ca.* Notice (C.) *Tomkins v. Ennis.* See also *Vin. Abr. Fraud* (1.) *2 East 50.*  
(3) And by the same statute 27 *Eliz. c. 4. §. 3.* any person party or privy to such fraudulent conveyance, who puts the same in use, and avows the same to be made on good consideration, to the prejudice of the purchafor, or his heirs, shall forfeit one year's value of the lands so purchased, one moiety to the crown, and the other moiety to the party aggrieved.

this



2. To deceive creditors and others of debt and such like duties.

\* P. 66.

this case it seems that the first lease is not void, and that the purchaser shall have nothing but the forged lease:

A deed also made of any thing with intent and purpose to deceive and defeat creditors of their just debts and duties, is void also as against such persons. For it is provided to this purpose

\* by other statutes, that all feoffments, gifts, grants, alienations, bargains, and conveyances of lands, tenements, hereditaments, goods, and chattels, or any rent, profit, or commodity out of land, made by fraud, or collusion of trust, to him that made the same, or otherwise with intent to hinder and delay, or put off, or put by creditors, or others of their just and lawful actions, suits, debts, accompts, damages, penalties, forfeitures, harts, mortuaries, or relieves, shall be void, as against them to whom such things shall belong, and he may recover the thing notwithstanding; but all such as are made *bonâ fide*, and upon good consideration, are not to be accounted fraudulent by this statute. For the better understanding whereof, these cases following are to be heeded. If a man, a little before his death, make a conveyance of his land to his children, or friends of his blood, with a proviso to make it void at his pleasure, and he take the profits of it as his own; or make a conveyance of it to friends, to the intent they shall not be subject to the payment of his debts, having bound himself and his heirs by any especialty, or to the intent that a warranty and assents shall not bind his sonne for other land, or the like; in this case, this conveyance shall be void, as to them that should have relief upon this land by descent; and especially when the conveyance is made after the suits begun; and more especially when any judgement is had upon the suits against him that doth make the deed. And so also is the law for goods: And therefore if one be indebted to *A.* 20*l.* and to *B.* 40*l.* and be possessed of goods to the value of 20*l.* and *A.* doth sue the debtor for his 20*l.* and, hanging this suit, the debtor secretly makes a generall deed of gift of all his chattels real and personal to *B.* in satisfaction of his debt, and yet doth afterwards continue the occupation, and use the goods as his own, and after *A.* getteth judgement and execution; in this case, the deed of gift to *B.* shall be said to be fraudulent, and therefore void as against *A.* So if in this case he give all his goods to *B.* in satisfaction of his debt, and before any suit begun by *A.* with any expresse or implicate trust, as to the intent that *B.* shall be favourable to the debtor; or that if the debtor provide the money that he shall have the goods again; or that he shall suffer the debtor to enjoy and use the goods and pay him as he can; in these, and the like cases, the deeds shall be said to be fraudulent and void, for howsoever it be made upon good consideration, yet it is not made *bonâ fide*. So if one in consideration of naturall affection, or for no consideration, give all his goods to his child, or cousin, *bonâ fide*, this shall be a void deed as to the creditors. *Et sic de similibus.* So if one give all his goods and chattels to his executor in his life time by deed of gift, this shall be said to be fraudulent, and shall be void as to creditors. And albeit those to whom the deed of fraud is made, know nothing of the fraud, yet is \* the deed fraudulent in that case also, as well as where they are privie to it. If after a commission of bankrupts be sued out the debtor make a deed of gift of all his goods to one of his creditors in satisfaction of his debt; in this case this deed shall be void, as against the rest

\* P. 67.

Stat. 3 H. 7.  
4. 2 R. 2.  
ch. 3.  
13 El. ch. 5.  
Co. 3. 8a.

Co. 5. 60. 3.  
82. Dyer  
295.

Co. 3. 80. 83.  
Bro. Donne.  
20. Plow.  
54.

Stat. 52 H.  
3 c. 9. 34 H.  
8. ch. 5. Co.  
5. 76. Lit.  
test. 59.  
Plow. 49.  
Co. 8. 164.  
9. 129.

Co. 2. 25.

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Prudgers v.

By the two Judges of Assize Aug. 2. Car. in Com. South. Lady Lambert's case.

of the creditors and as to the commissioners, and they may order it with the rest of the estate notwithstanding. But if *A. bonâ fide* and for valuable consideration mortgage his land, whereof he hath a term of years, to *B.* upon condition that if he repay the money to *B.* a year after, that he shall reenter, and *B.* doth covenant with *A.* that he shall take the profits of it untill that time, &c. *A.* doth not pay the money, and *B.* hoping that he will pay it in time, doth suffer him to continue in possession and take the profits of it two or three years after, and in the interim judgment is had against *A.* upon a bond, and execution awarded; in this case execution shall not be made of this lease; for this deed of mortgage shall not be said to be fraudulent as to the creditor: for when a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter *ex post facto* (1).

Mich. 19. Jac. Co. B. Miller & Pot's case.

If *A.* be seised of the fifth part of the manor of *B.* and *B.* of the sixth part, and *M.* cometh to *A.* to buy his part, and after *M.* faith to *A.* my counsell tells me I cannot safely buy of you unlesse *B.* joyn, and after *B.* doth grant a rent charge of 15*l.* per annum out of this manor to *C.* her son, and the heirs of his body, in consideration of naturall affection, (and this was about 10 Jac. *C.* being then but about three years old) with proviso, that if *D.* whom *B.* did then intend to marry) grant to the said *C.* the like rent of 15*l.* and for the like estate out of 20*l.* land by the year, of the land of *B.* then the said grant to be void, and after the said *A.* bought the 6th. part of the said manor, of *B.* and *D.* her husband, being intermarried, and after *A. B.* and *D.* her husband joyn in the grant to *M.* in this case it was ruled that this grant to *C.* was not fraudulent and void. If one doth hold his land, to pay a heriot at the death of every one that dyeth tenant in fee simple, and he infeoffe his son and heir in consideration of naturall affection, and marriage to be had between the son and *I.* and the son (to prevent the dower of his intended wife during his fathers life) makes a lease for forty years unto his father, if his father live so long, and afterwards the marriage is had, the father payeth the rent, the son doth suit of court for the land, and after the father dieth; in this case this lease shall not be said to be fraudulent as to the Lord to deceive him of his heriot because it was, made to another end.

Stat. 52 H. 3 c. 9. 34 H. 8. ch. 5. Co. 5. 76. Lit. sect. 59. Plow. 49. Co. 8. 164. 9. 129.

A deed also made to defeat the King or other Lord of his wardship shall be void, as to a third part of the thing conveyed. And therefore, if any tenant that holdeth of the King, or any \* other Lord make a feoffment or other conveyance of his land, to defeat and defraud the King or Lord of his wardship, primer seisin, or any other benefit appointed and preserved for the Lord by the statutes of 32 and 34 H. 8. it shall be void, as to a third part thereof against the King or other Lord, who shall notwithstanding have their wardship and other benefits, as if none such were made. As if such a tenant by deed enfeoffe his lineall or collaterall heire within age, or make a lease for life the remainder to his heire, or make a gift in tail the remainder in fee to his heire, or make a

3. To deceive Lords of their wardships, &c.

\* P. 68.

(1) But if a deed be fraudulent in its creation, yet it may become good by matter *ex post facto*; as where a fraudulent feoffment is made, and the feoffee makes a feoffment to another for a valuable consideration, and the first feoffor does afterwards, for a valuable consideration, make a second feoffment; the feoffee of the feoffee shall hold in preference to the second feoffee of the first feoffor. 1 Sid. 134. *Prodgers v. Langham*.

feoffment on condition that he shall re infeoffe his heire at his full age, or make a feoffment for the payment of his debts, or preferment of his wife and children, or infeoffe another to the intent that he shall take the profits till he have an heire male, and then to re infeoffe him: all these are fraudulent and void, as to a third part of the land, and as against the King or other Lord, in respect of the benefit they are to have of and by the land. But no conveyance in these cases shall be said to be fraudulent and so void, for two parts of the land. And if one make a feoffment of land to two (whereof his heir is one) and their heires, for money or other valuable consideration; this shall not be said to be a fraudulent conveyance of any part. So if such a joyntenant make a feoffment of his moiety to a stranger. † And in cases where the feoffment is fraudulent for a third part as before, if the feoffee dye or make a feoffment over *bonâ fide* before the death of the ancestor, in these cases the deed is become good again, and the collusion gone. If a man for fear of debts convey his lands to friends, with condition that upon payment of 10*l.* they shall convey it to those whom he shall appoint, in this case the conveyance shall not be said to be fraudulent as to the King or other Lord, for it was done to another end, and therefore it is a good conveyance against all men but the creditors (1). Where deeds shall be void in part or in all, for want of inrollment, attornment, livery of seisin, or the like, see afterwards.

6. Where a deed good in its creation may become void by matter *ex post facto*. And what will make such a deed void or not.

1. By rasure.

If a deed that is well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words (though they be still legible) or by writing new letters upon the old, in any material place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted, or in the limitation of the estate, or if it be in an obligation, when the word [heires] shall be inserted, or the summe increased, or in the date of either, or the like; be the same either by the party himself that hath the property of the deed, or any other whomsoever, except it be by him that is bound by the deed, and be the same with or without the consent of him to whom it is made or doth belong, in this case, and by either of these means, the deed hath lost its force and is become void (2).

\* P. 69.

\* And if the alteration be made by the party himself that owneth the deed, albeit it be in a place not materiall, and that it tend to the advantage of the other party, and his own disadvantage, yet the deed is hereby become void. But if the alteration be made by the party himself that is bound by the deed in any materiall or immateriall part thereof; or if a stranger without the privity or consent of the owner of the deed shall make any such alteration in any part of the deed not materiall; as if it be a deed of a grant containing a lease for years, and there be inserted between [To have and to hold] and [for thirty years] these words [from henceforth;] or, if it be an obligation and there be inserted between [*obligo me*]

(1) Fraudulent conveyances and gifts are only void against purchasers, and creditors, and shall bind the parties themselves and their representatives. *Cro. Jac.* 270. See further as to the construction of the statute respecting fraudulent conveyances and gifts as to purchasers and creditors, and the cases determined under them both in the courts of Law and Equity, in *Bac. Abr. Fraud (C.) Com. Dig. Covin (B. 2.)*

(2) *A.* and *B.* sealed and delivered a bond to *C.* and after, the name and addition of *D.* was interlined, and he also sealed and delivered the obligation, with the consent of all parties; held to be a good obligation of all three. 2 *Lev.* 35.

and

Perk. Se.  
123. 124.  
Bro. Fait.  
Perk. 12.  
127. 128.

Co super  
Lit. 225.

Dier 59.  
Co. 11 28.  
23. Dyer  
112.  
Perk. Sect.  
135. 136.  
Bro. Oblig  
83.

Trin. 38 El.  
Co. B.  
Dier 112.

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(3) See ac  
shall be relie  
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*much v Patton*  
*9 East 381*  
*Bayly v B. Fell*  
*5 Taunt. 707*



and [*per presentes*] these words [*et executores meos*] in both which cases those words are needlesse and without any fruit at all; hereby the deed is not hurt, but it remaineth good notwithstanding. But if the alteration be before the delivery of the deed, be it whatsoever, or by whomsoever, it will not hurt the deed. And herein it must be observed, that then a rasure, &c. is most dangerous, and the deed thereby most suspicious, when it is in a deed poll, and there is but one part of the deed; and when the rasure or other alteration is in any materiall part of the deed; and when the alteration makes to the advantage of him that doth own the deed, and to the disadvantage of the other that made it; and when there doth appear some other thing to be written before; and when there is no other part of the deed, recitall, defeasance, or other matter to which this may be compared, and that may make it appear to be before the delivery; and when there be other parts of the deed, or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the smoke, or any such like means hath been used to cover the alteration. And in these cases the matter was anciently used to be tried by the judges upon the view of the deed; but it is now used to be tried by jurors, whether the rasure, or other alteration, were before the delivery of the deed or not (1).

And if after the sealing, delivery and perfection of a deed, the seale thereof happen to be broken off, or to be utterly defaced, so that no sign or print thereof can be seen, or it appeareth to have been broken off and it is glued, or the wax new heated and set on again, or the labell of the deed hath been broken off from the deed, and is sowed on again, or the deed is new sealed with other wax; be the same by whatsoever means or whomsoever, unlesse it be by him and his means that is bound by the deed; in these cases, and by either of these means, the deed is become void. But if any piece of the seal remain fixed to the deed, and there be any print left upon that piece, the deed doth continue good. And if after a seale of a deed be broken off, the party that sealed it, do seale and deliver \*it *de novo*; by this means, \* P. 70. it seems the deed is become good again (2).

And if a deed be delivered up to the party that is bound by it to be cancelled and it be so; or if he that hath the deed doth by agreement between him and the other cancell the deed; by either of these means the deed is become void. But if an obligee deliver up an obligation to be cancelled, and the obligor do not afterwards cancell it; but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force (3).

(1) When a lawful deed is raised, whereby it becomes void, the obligor may plead *non est factum*; because, at the time of the plea, it is not his deed, 11 Co. 27. a. See further in what cases rasure, or interlining, will vitiate a deed, *Vin. Abr. Fairs (T.) Com. Dig. Fait. (F. 1.) Roll. Ab. S. Fairs (T. U.)*

(2) It seems in a several deed, if the seal of one of the parties is broken off, it does not vitiate the deed as to the others, though it is otherwise, if the deed was joint, *Cro. Eliz. 408. 2 Lev. 220*. Upon proof made how the seal was broken off, the deed admitted to guide the uses of a recovery, *Latch 226* — Where the seal is broken off, *non est factum* is a good plea, 5 Co. 119. b. See further *Com. Dig. Fait (F. 2.) Vin. Abr. Fairs (X.)*

(3) See accordingly *Cro. Eliz. 483.* and further as to the effect of cancelled deeds at law, where they shall be relieved against in equity; and what remedy may be had against persons cancelling or destroying deeds, *Vin. Abr. Fairs (X. 2. 3. 4.)* A assignment by commissioners of bankrupt to three, that being cancelled, and another made to two of them; the cancelling the first does not alter the property. 2 *Lev. 113.*

4. By disagreement.

And if an obligation be delivered as an escrow to a stranger, to be delivered to the obligee on certain conditions; or to a stranger to the use of the obligee, and when this is after tendered to the obligee he doth refuse it and disagree to it; or if an obligation be made to a feme covert, and her husband disagree to it; in all these cases the deed is become void. And like law is of other deeds in divers such like cases. But the party bound by the deed may not in these cases plead *non est factum* to the deed. And in these cases when the party hath once by his agreement made the deed good, he cannot afterwards by his disagreement make it void; and when once, by refusal and disagreement he hath made the deed void, he cannot by agreement or acceptance afterwards make it good.

Agreement.

A deed also good in its originall creation may be afterwards damned or avoided by sentence and order of a court; and this is usually done in the ~~Starre Chamber~~ and in the Chancery; and it is when it appeareth that the deed was obtained by some fraud, force, circumvention, or such like practice, or when it doth appear to be forged, or the like.

5. By judgment of a court.

A deed also good in its originall creation may be afterwards damned or avoided by sentence and order of a court; and this is usually done in the ~~Starre Chamber~~ and in the Chancery; and it is when it appeareth that the deed was obtained by some fraud, force, circumvention, or such like practice, or when it doth appear to be forged, or the like.

Vacat of a deed.

For the answer of this question these differences must be observed. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning, is entire, and when it doth consist of several clauses: and when it doth consist of severall clauses, when the several clauses are absolute and distinct, and when they are severall, and yet the one hath dependency upon the other. For if any of the covenants of an indenture, or the conditions of an obligation be against law, and the rest of the covenants or conditions be good and lawful; in this case those that are against law, and the deed as to that part, are void *ab initio*; and the rest, and the deed as for that part, are good *ab initio*. So if three distinct obligations are written upon a piece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seale and deliver the deed; in this case this is a good deed, for that which was read, and void for the rest *ab initio*. But if an obligation be for 20*l.* and it be read to the obligor an obligation of 20*s.* this is void for the whole *ab initio*.

7. When and where a deed may be good in part and void in part. Or good against one person and void against another, or not.

For the answer of this question these differences must be observed. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning, is entire, and when it doth consist of several clauses: and when it doth consist of severall clauses, when the several clauses are absolute and distinct, and when they are severall, and yet the one hath dependency upon the other. For if any of the covenants of an indenture, or the conditions of an obligation be against law, and the rest of the covenants or conditions be good and lawful; in this case those that are against law, and the deed as to that part, are void *ab initio*; and the rest, and the deed as for that part, are good *ab initio*. So if three distinct obligations are written upon a piece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seale and deliver the deed; in this case this is a good deed, for that which was read, and void for the rest *ab initio*. But if an obligation be for 20*l.* and it be read to the obligor an obligation of 20*s.* this is void for the whole *ab initio*.

\* Page 71.

\* If a deed be read as containing the grant or gift of an estate taile, and a letter of attorney to give livery of seisin, and in that sense the party doth seale it, and in truth it is a feoffment and conveyance of an estate in fee simple; in this case, albeit the letter of attorney were truly read, yet, because it hath dependency on the estate, it is void for all.

If a man be indebted to me 20*l.* on a contract, and 100*l.* on an obligation, and he pay me this 20*l.* and I am to make a release for it, and the intendment of the release is no more; and it is so read to me being an illiterate man, but in truth it is a general release; in this case it seems it is good for so much as it is intended and was declared, and void for the rest.

If the condition of an obligation be altered by rasure, &c. the obligation also is hereby become void, because the condition and obligation are one deed; but if the rasure, &c. be in the defeasance of an obligation, this will not make the obligation void.

If a deed contain divers distinct and absolute covenants, and any of these covenants be altered by addition, interlineation, rasure,

or

Co. 5.  
11. 28.  
3 H. 7.

14 H. 8.  
Peik. fo

Co. 1. 17.  
Dier 127.  
See in Le.  
Numb. 1

Co. 2. 4.  
5 H. 7. 2.  
Plow. 49.  
Dier. 307.  
315. Fitz.  
Feoffment  
& Fairs. 8.  
63. 95.

Fitz. Feoff.  
& Fairs  
Barre. 147

or the like, by this means the whole deed, and not that part onely, is become void.

Co 5. 23. If there be divers grantors, obligors, &c. named in a deed, and  
11. 28. one of them onely do seal the deed, this is a good deed as against  
3 H. 7. 5. him that doth seal, and void as to all the rest that do not seal.  
And if divers enter into covenants by a deed severally, and the seal  
of one of them is broken from the deed; in this case the deed is  
good still as to all the rest, but void as to him. But if an obliga-  
tion, or the covenants of a deed, be joynt and not severall; or joynt  
and severall, and the seal of one of the obligors or covenanters is  
broken; or the obligation, or covenants, be altered by rasure or  
the like; hereby the whole deed is become void.

14 H. 8. 29. If I be bound in an obligation to a Monk and I. S. this deed is  
Peik. fo. 2. void as to the Monk but good as to I. S. So if a Monk and I be  
bound to another; this is good as against me, but void as against  
the Monk. And so it is in case of a grant.

Co. 1. 173. By a power of revocation, or a condition, a deed may be made  
Dier 127. void in part and continue in his force for another part. And there-  
See in Leak's fore it seems in the usual case where a deed is made upon condi-  
Numb. 13. tion, That if such a thing be or be not done, the deed shall be  
void, or these presents shall be void; that in these cases the whole  
deed and all the covenants therein contained are void: But if the  
frame of the condition be, that upon such a thing to be, or not to  
be done, it shall be lawful for the feoffor, lessor, &c. to re-enter,  
or that the demise shall be void, without more words; in these  
cases the estate onely, and those covenants that are incident there-  
unto, as for quiet enjoying and the like, and the deed as to \* that  
part onely is void: and for other covenants that are collateral, and  
have no dependence upon the estate, that part of the deed doth re-  
main in force and is good still; for a man may grant two acres  
upon condition to re-enter into one of them. If it be intended  
that the whole deed shall be void, the best way is to use these  
words, [then these presents, and every thing therein contained,  
shall be utterly void.]

Co. 2. 4. 5. All deeds do take effect from, and therefore have relation to, 8. How and  
5 H. 7. 26. the time, not of their date, but of their delivery: and this is al- to what time  
Flow. 491. ways presumed to be the time of their date, unless the contrary a deed shall  
Dier. 307. do appear. And hence it is, That if a statute be acknowledged have rela-  
315. Fitz. the 26th. day of May, and the conusee make a release of all de- tion: and  
Feoffments when it shall  
& Fait. 87. mands dated the 25th. day, and deliver it the 27th. day; by this begin to  
63. 95. release the statute is discharged. And that if the defeasance of a take effect.

1. 28. Feoff- 8. How and  
and to what time  
57. a deed shall  
3. 3. have rela-  
tion: and  
27. when it shall  
begin to  
take effect.

8. 15. Fitz. Feoff.  
11. 28. & Fait.  
Barre. 147. deeds, of several dates, and the deed that beareth the last date be  
first



first delivered; in this case, he to whom this deed is made, shall have the presentation, and not the other, whose deed albeit it be dated first yet is delivered last. And hence it is also, that if a lease be made for years, to begin from henceforth, or *à confessione presentium*, or *a die confessionis*; this lease shall be said to begin from the time of the first delivery, and not from the time of the date.

Relation.

And where deeds have a kind of double delivery, as in case of a delivery as an escrow, there they shall take effect from, and have relation to, the time of the first delivery, or not, *ut res valeat*: for if relation may hurt, and for some cause make void the deed, (as in some cases it may,) there it shall not relate. But if relation may help it, as in case where a feme sole deliver an escrow, and before the second delivery she is married, or dyeth, in this case, if there were not a relation, the deed would be void, and therefore in this case it shall relate (1). So if one disseise me of two acres of land in D. and I release to him all my right in my lands in D. and deliver it to an estranger as an escrow, &c. until a time, and before that time he disseise me of another acre there; in this case this release shall not by relation extend to this other acre to barre me of that also. But as to collateral acts there shall be no relation at all in this case. And therefore if the obligee release before the second delivery, the release is void, and will not barre the party obligee of the fruit of his obligation (2).

9. When and where a deed must be shewed in court. And how long it shall abide there. And who may take advantage of it.

If a man that is party or privy in estate or interest, or one that doth justifie in the right of one that is such a party or privy, shall plead a deed in any court; although he claim but parcel of the original estate, yet in this case, he must shew the original deed to the court: and the reason of this is, to the end that the legal part of the deed (the tryal whereof belongeth to the Judges) may approve it self; *i. e.* that it may be seen whether the composition of words be sufficient in law or not; and then that it may appear whether the estate be with condition, limitation, or with power of revocation, &c. to the end that if there be any such thing in it, and there be no other part of it, the other party may take advantage of it; and then that it may appear to be without rasure, or interlining, and the like; and also that it may appear to be well sealed and delivered, (the tryal whereof doth now belong to the country.) But strangers to estate, that are neither parties nor privies, shall not be compelled to shew the deed, tho' they make use of it (3). And when a deed is thus shewed in court, it must remain in that court, all the term wherein it is shewed, in the custody of the *custos brevium*; and at the end of the term, if the deed be not denied, the law doth adjudge the possession of

(1) See accordingly *Jennings v. Bragg*, Cro. Eliz. 446. So also it is of a deed of feoffment, and letter of attorney therein to make livery, by a man *saue memoriae*, which is delivered by the attorney when the feoffor is *non compos mentis*, yet it is good, because it hath relation to the authority before.

(2) In what cases subsequent acts shall bind by reason of their relation to precedent ones, see *Vin. Abr. Deeds* (O.) *Relation* (E.) *Com. Dig. Bargain and Sale* (B. 9.) *Confirmation* (D. 5.)

(3) See fully in what cases it is necessary to shew the deed or not, *Com. Dig. Pleader* (O.) (P.) *Will. Rep.* 1 vol. part 1. p. 121. 2 vol. p. 1. *Vin. Abr. Facts* (M. a.) But in cases of great and notorious enmity, which have occasioned the destruction of the deed, as by casualty of fire; in that case, he who suffers so great a loss, may be permitted upon the general issue to prove the deed in evidence to the jury by witnesses, in order that affliction may not be added to affliction. 10 Co. 92. b. The evidence on a casual destruction of a deed, is the same in a Court of Equity, as in a Court of Law. 1 Vesf. 235. In what cases relief may be had in equity on the destruction or loss of a deed, see 1 Vesf. 392.

the deed in him to whom it doth belong. But if the deed be denied, then it is to be kept there until it be determined. Also when a deed is shewed in court, the adverse party may take any advantage by it that it will afford him; as if a feoffment be made by deed poll on condition, and the feoffee doth break the condition, and the feoffor doth enter, and the feoffee doth sue him, and makes his title by that deed, the feoffee may take advantage of the condition.

Any man that hath occasion to use or plead a deed, may set forth the delivery thereof to be at any time after the date of the deed; and in some cases he must do so, if he will have any advantage by it. As if he plead a release to an obligation, and it beareth date before the obligation; in this case he must averre that it was delivered after, or it will not avail him. But a man may not in pleading set forth the delivery of a deed to be before the date of the deed. And yet if it be so that a deed be dated after the time of the delivery of it, the deed is good; and therefore if he that doth use such a deed do plead and set it forth as a deed made before the time of the delivery, and the party that made it plead *Non est factum* to the deed, a jury upon the trial may find the truth of the case: but if he by his pleading set forth the deed to be delivered before the time of the date, then the jury is concluded as, well \* as the party himself; for a jury is estopped to find any thing \* P. 74. contrary to that which is apparently admitted in the record. In debt brought by an executor, the defendant pleaded the release of the testator, which did bear date after the death of the testator, but he did averre the delivery of it in the life time of the testator and the court did not allow of this plea.

Sometimes antiquity added the place where the deeds were made, as *datum apud B.* and this was in disadvantage of him to whom the deed was made; for if the deed be in general, and without this addition, he may alledge the deed to be made where he will. An obligation made beyond the seas may be sued here in England in what place the obligee will, and if it bear date at *Burdeux* in France, it may be alledged to be made in *quodam loco vocat. Burdeux* in France in *Islington* in the county of *Middlesex*, and there it shall be tryed: for whether there be such a place in *Islington* or not, it is not traversable in that case.

*Non est factum* is an answer to a declaration, whereby a man denieth that to be his deed whereupon he is impleaded.

If any deed or writing be used against a man in any court, and it want writing, sealing, or delivery, or it be not sealed, written, and delivered as before is set forth, the party that is sued upon it, or against whom it is pleaded, may plead this plea to it. So also if a deed by any alteration of rasure, &c. become void; in this case the party may plead this plea to avoid it. So also where a deed doth become void or lose its virtue by the not reading, or not true reading of it to an illiterate man, or by refusal or disagreement, as in the cases before, the party may plead this plea to avoid it. But in all cases where the deed is voidable, and so remaineth at the time of the pleading; as if an infant, or man of full age by duress, seal and deliver a deed; or if an obligation be well sealed and delivered by two, and the deed be joint, and the obligee sue one of them; in these and such like cases, the party bound by the deed

10. Where one may say his deed was delivered at another time, or in another place.

Estoppel.

\* P. 74.

*Non est factum; Quid.* And where this may be pleaded to a deed, or not.

*Boulton v. Carr*  
2 W. W. 157

deed may not plead *Non est factum*; for in the first and such like cases he must avoid it by special pleading, with conclusion of judgment *fi actio, &c.* and in the last he must plead in abatement of the writ, *&c.* And if an obligation or any other deed be by any special act of parliament made void, the party that is bound by it cannot plead this plea of *Non est factum* to it; but he must avoid it by special pleading of the matter, and taking advantage of the statute, and so with conclusion of judgment *fi actio, &c.* (1).

And now we come to the exposition of deeds.

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(1) Accordingly 5 Co. 119. 11 Co. 27. a. see further by whom the plea of *non est factum* may be had, in what cases, and at what time, *Vin. Abr. Faits* (N. a.) N. a. 2.) *Com. Dig. Pleader* (2 W. 18.)

Co. super  
Lit. 6. 7.  
Co. 11. 51  
a. 55.  
Plow. 196

Co. super  
Lit. 6. 7. 10  
107.

Plow. 152.  
Dier 95.  
Perk. Sect.  
151.

CHAP.

(1) One v  
in the *Hab*  
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mainder.



## CHAP. V.

## Exposition of Deeds.

IT is further to be observed, that deeds for the most part consist of these things, viz. the premises, *Habendum*, *Tenendum*, *Reddendum* or reservation, condition, warranty, and covenant. And in the premises there is sometimes a recital, and sometimes an exception contained: but all these are not essential parts of a deed; for a deed may be good, albeit it have not all these parts, or it be not so formall and orderly drawn and made.

The premises of a deed are all the foreparts of the deed before the *Habendum*. And yet this word is sometimes taken for the thing demised, or granted, by the deed. And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, either by expresse words, or by that which by reference may be reduced to a certainty, and the exception, or thing to be excepted, if there be any. And, in this part of the deed is the recital (if there be any in the deed) for the most part contained. And herein also is sometimes (though improperly) set down the estate.

The *Habendum* of a deed, is that part of the deed which doth begin with, *to have and to hold*. And this doth properly succeed the premises. And the office hereof, is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. And herein also is sometimes, though needlessly, set down again the thing granted. But the deed that doth usually consist of all these parts, may be good notwithstanding some of them be omitted, and it be not so formally made. For an estate may be made by a deed without any *Habendum* at all. As if one give or grant land to another and his heires, without any more words in the deed; or if one give or grant land to another, and limit no estate, without any *Habendum* in the deed, and seale and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made. And if the name of the grantee be not contained in the premises, yet if it be in the *Habendum*, it may be good enough (1). As if one give or grant land, *Habendum* to B. and his heires, and he is not named in the premises, yet this is a good deed to make an estate in fee simple. And yet if the thing granted be only in the *Habendum*, and not in the premises of \* the deed, the deed will not pass it. And therefore if a man grant black acre only, in the premises of a deed, *Habendum* black acre and white acre; white acre will not pass by this deed. But if the thing, newly added, be implied in the thing granted by the premises of the deed, as being an incident thereunto, or otherwise; or it be the same thing, and expressed in other words only; in these cases the premises and

1. Premises.  
*Quid.*

2. *Habendum.* *Quid.*

Where a deed is good, notwithstanding some seeming fault in the premises or in the *Habendum*.

*Hyde v. Lopham*  
13 East. 115

\* P. 76.

(1) One who is not named in the premises, may nevertheless take an estate in remainder, by limitation in the *Habendum*, 2 Roll. Abr. 68. Hob. 313. In 3 Leon. Ca. 60. it is said, that the *Habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder. See more amply in Vin. Abr. Fairs (C. a).

the *Habendum* may stand together. As if one grant a manor, *Habendum* the manor, with the advowson appendant to the manor; or if one grant a reversion of land, by the name of a reversion, in the premises, *Habendum* the land itself; in both these cases the deed is good, and the advowson, and reversion, will pass. So also if livery of seisin be made of the thing newly added, in this case perhaps it might pass by the livery; and if the thing granted be left out in all, or in part, in the *Habendum*, yet the grant is good. And therefore if one grant land to *A. Habendum* to *A.* his heirs, &c. or if one grant white acre and black acre to *A. Habendum* white acre to *A.* and omit black acre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases. And if a feoffment be made to one, *Habendum* to him and his heirs, without the word assigns; this is a good feoffment, and the estate thereby made is assignable: as where a lease is made to one his executors and administrators, without the word assigns, this is a good lease and assignable. So if one grant land to *A. Habendum* to him for one hundred years; or *Habendum* to him and his assigns for one hundred years; these are as good leases as the lease that is made by these words *Habendum* to *A.* his executors, administrators, and assigns, for one hundred years. So if a lease of land be made to *A. Habendum* the land to him and his heirs for one hundred years, this is a good *Habendum*, and the word [heirs] is void, and it shall go to his executors, &c. As also where land is granted to *A. Habendum* to him and his successors for one hundred years; this is a good lease, and the word [successors] void, for it shall go to executors, &c. And if a lease be made *Habendum* for years, and say not how many years, this is a good *Habendum*, and a lease for two years (1).

3. Recitall.  
*Quid.*

4. Where it  
is needfull;  
or not.

5. Where  
misrecitall  
will hurt a  
deed; or  
not.

\* P. 77.

A recitall is the setting down, or report of something done before (2).

When a man is to take any new estate from the King of a thing whereof there is any estate in being, there the former estate if it be good and of record, must be rehearsed and recited in the deed, or else the second grant will not be good (3). But in case of a common person there needs no such recitall; neither when a man is to derive an estate out of a former, or assign over a term of years, is it needfull there should be any recitall of the former estate in being.

If one recite or rehearse an estate made for term of years, and \* then after grant over that term to another, and mistake in the recitall; this mistake may make all void (4). As if a *fieri*

(1) See further as to the exposition and operation of the *Habendum*; *Com. Dig. Faits* (E. 9.) and how far the *Habendum* may enlarge, or abridge, explain, or qualify, the premises. *Lilly's Conveyancer* 215 *Co. Lit.* 183. 299. a. *Vin. Abr.* Grants from (I. a.) to (N. a.).

(2) Recital of itself is nothing, but being joined, and considered with the rest of the deed, is material; per *Clinch*, 1 *Leon.* 122. A recital is not a necessary part of a deed, either in law or equity.—It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect, or operation: 3 *Chan. Ca.* 101. A recital is not conclusive, because it is no direct affirmation: *Co. Lit.* 352. b. It is said covenant will lie upon a recital, see *Graves v. White*, 2 *Eq. Ca. Abr.* Portions (C). But recitals shall not make an estoppel, for they are not material. *Finch's Law* 33.

(3) For the doctrine of grants by the King, and when they shall be good or void, see *Vin. Abr.* Prerogative of the King (G. b. 2). &c. In what cases false recital shall make them void, *ibid* (Q. b.) When a recital is necessary in them *ibid*, (Q. b. 2.) and further in *Bac. Abr.* Prerogative (F).

(4) If a lease is misrecited, and then the land comprized in it is granted, *Habendum* for twenty-one years after the expiration of that lease: it is a good grant for twenty-one years after the expiration of the former lease; notwithstanding the misrecital. 1 *Lev.* 235.

Lit. 1. Co.  
SuperLit. 46.  
Co. 6. 35.  
Termes of  
the law, tit.  
Assigns.

hier 93.  
60.

H. 7. 3.  
itz. Grant

hier 50.  
7. 376.

low. 361.  
95. Dier 59.  
erk. Sect.  
45.  
o. super  
it. 47.  
H. 6. 45.

R. Fre-  
nnel's  
se.  
erk. Sect.  
1, &c.

ow. 19.  
o. super  
it. 47.

(1) When  
ence, *ibid*,  
(2) And be  
6. b.  
(3) For if  
re. *Eliz.* 6.

facin

*facias* come to a sheriff to levy a debt, and he by writing recite that the defendant hath a term of years, and doth suppose it to begin 1 *Maii*, 2 *Jac.* when in truth it doth begin the 20th of *August*, and then sell the same term; in this case this sale is void. But if he add withall these words in the deed [and all the interest that the defendant had in the land]; or if he make sale of it for a certain number of years only; this grant may be good notwithstanding the misrecitall.

If one recite a former lease to be made such a day to *I. S.* and then make a new lease to begin after the end of the former lease, and mistake the date of the old lease; in this case the deed is good notwithstanding this mistake.

If one grant a reversion, and in reciting the lease in possession mistake the date of it only and recite all the rest truly; this will not hurt the grant. No more than where a man doth recite that such land came to him by forfeiture, and then doth grant it by name; for in this case albeit it did not come to him by forfeiture but by surrender, yet this mistake will not hurt. And yet in case of the King such a misrecitall may make the grant void.

If I grant to *I. S.* all the lands in *Dale* which I purchased from *I. D.* or which came unto me by descent from *I. D.* or I give all my goods to *I. S.* which I have as executor to *I. D.* and in truth I have no such lands, or goods, but I had them by some other means, or of some other person; in these cases, and by this mistake, the deed is void. But if I grant to *I. S.* all my lands in *Dale* by name, as white acre, which I purchased of *I. D.* and in truth I did purchase them of another, in this case this mistake will not hurt the deed. So if I grant twenty load of wood in *Dale*, in the great wood which I had of the grant of my father, and in truth I had it not of the grant of my father, but of the grant of another, in this case the grant is good (1). But of this matter see more in *Grant Numb. 4. part 5.*

An exception is a clause of a deed whereby the feoffor, donor, grantor, lessor, &c. doth except somewhat out of that which he on, *Quid.* had granted before by the deed (2). And this doth most commonly and properly succeed the setting down of the things granted, and is made by one of these words *except*, *preter*, *salvo*, *si non*, or such like. And hereby the thing excepted is exempted, and doth not pass by the grant, neither is it parcell of the thing granted: as if a manor be granted excepting one acre thereof, hereby in judgement of law that acre is severed from the manor. But this may be in any part of the deed, and so hath it been resolved. *Hil. 17. Car.*

In every good exception these things must always concur, 6. What 1. This exception must be by apt words. 2. It must be of part shall be said \* of the thing granted, and not of some other thing. 3. It a good ex- must be of part of the thing only, and not of all, the greater ception; or not. 4. It must be of such a thing as is severable from the thing which is granted, 5. It must be of such a

(1) When a recital is necessary, see in *Com. Dig.* Grant G. 10. how far it shall be considered as evidence, *ibid.* Evidence (B. 5). and further in *Vin. Abr.* tit. Relation.

(2) And being the act and words of the feoffor, &c. shall therefore be taken against him *stricto*, 10 *Co.* 66. b.

(3) For if the exception extends to the whole thing granted, or demised, it is void, *Dorrel v. Collins*, 1 *Eliz.* 6.



thing as he that doth except may have and doth properly belong to him. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It must be certainly described and set down. As for examples. <sup>a</sup> If a man grant all his lands in *Essex*, saving, besides, or except his lands in *Dale*, or all his lands in *Dale*, excepting one house, or one acre in certain; or one house, excepting one chamber in certain; these and such like exceptions are good (1). <sup>b</sup> And if one grant a manor, excepting one tenement (parcell of the manor), or excepting the services of *J. S.* (who doth hold of the manor), or excepting one close, or excepting one acre, or excepting the advowson appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the grosse trees; these are good exceptions.

<sup>c</sup> And if one grant a messuage and houses thereunto belonging, excepting the barn, or excepting the dovehouse; it seems this is a good exception, for they may pass by the grant of a messuage &c. <sup>d</sup> And if one grant land, excepting the timber trees thereupon, or excepting the trees thereupon; or if a man sell a wood, excepting twenty of the best oaks, and shew which in certain; these are good exceptions. <sup>e</sup> So if one have a manor wherein is a wood called the great wood, and he grant his manor, excepting all the woods and underwoods that grow in the great wood and all the trees that grow elsewhere, this is a good exception. <sup>f</sup> And if one grant a messuage and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception. <sup>g</sup> And if one grant a reversion, excepting the rent; this is a good exception of the rent, and doth keep it from passing by the grant. So if a man have a rent-charge out of land, and he release his right in the land, except the rent; so if the Lord release to his tenant *salvo dominio suo*, &c. these are good exceptions. <sup>h</sup> And if one grant all his horses, except his white horse; this is a good exception of the white horse. <sup>i</sup> And if a man be seised of a manor, and lease it by deed indented for life, *exceptis & reservatis quod bene liceat* to the lessor *succidere, dare & vendere omnes grossas arbores in dicto manerio crescentes*, &c. it seems this is a good exception of the trees (2). But if the exception be of another thing than the thing granted; <sup>k</sup> as if one grant a manor or land, excepting 12d. or excepting the tithes, or excepting one acre of ground which is no parcell of the manor or of the land before granted; or if one grant the land descended to him of the part of his father, excepting the land descended to him of the part of his mother; these exceptions are void. <sup>l</sup> Or if the exception be such as it is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it; or grant a manor, excepting the services; these are void exceptions. <sup>m</sup> So if one grant his house, chambers, cellars, and shops, excepting his shops; it is said 263.

\* P. 79.

(1) See distinction between a *saving* and an *exception*, in *T. Raym.* 359. *Plowd.* 361. An *exception* out of an *exception*, or a *saving* out of a *saving* is good enough, and makes the thing as if it had never been excepted. *Leigh v. Shaw*, *Cro. Eliz.* 372.

(2) If a man lets his manor, *exceptis omnibus boscis*, the soil of the wood is excepted; but it remains parcel of the reversion of the manor, and shall pass by a grant, or lease of the manor, 5 *Co.* 11. *Cro. Eliz.* 521.

(1) Thofe  
(2) See fu  
in *Com. Dig.*  
(3) Ante 5

this is no good exception. And by the like reason if one grant his meadow and pasture grounds, except his meadow grounds, this exception is not good, no more than if one grant two manors, or two acres, excepting one of them. And of this opinion was the Chief Justice in *B. R. Hil. 3 Car.* in the case of *Haward and Fulcher*.<sup>a</sup> And yet if a man make a lease for years of a mill, excepting the profits thereof during the life of the lessor; it is said, this hath been adjudged a good exception. But I doubt of this case, for the exception of the profits of a thing is the exception of the thing itself. And a man cannot grant an estate and reserve a part of the estate; as make a feoffment in fee, and reserve a lease for life; or grant an advowson, and reserve the presentation for his life. Or if the exception be of an inseparable incident and a thing that cannot be granted by itself and from another, as if a manor be granted, excepting the Court Baron, or land be granted, excepting the common appendant thereunto belonging; these exceptions are void. But exceptions of severable incidents are good.

Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for years assign over all his term in the land, excepting the timber trees, earth, or clay; this exception is not good (1). But if lessee for life make a lease for years, or lessee for twenty one years make a lease for twenty years; or tenant by the curtesie, or in dower, grant over their estate, excepting the timber trees; these are good exceptions. And if a lessee for life or years open a coal mine, and then assign over his estate, excepting the mines or the profits thereof; these are void exceptions. Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre, excepting white acre, or grant twenty acres of land by particular names, excepting one acre of them; these exceptions are void. Or if the exception be set down uncertainly, as if one grant a house, excepting one chamber; or grant a manor, excepting one acre; but doth not set forth which chamber, or which acre it shall be; these exceptions are void (2).

A *Tenendum* is a clause of the deed whereby the tenure was heretofore created. And this doth most commonly and properly succeed the *Habendum*, and was made by this word *tenendum per servitium, &c.* But since the statute of *Quia emptores terrarum* \*\* P. 80. when the fee simple doth pass, the tenure is alwaies of the chief Lord, and is thus set forth, *tenendum de capitalibus dominis, &c.* And this clause at this day is for the most part omitted altogether (3).

A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the *Tenendum*, and is made by one or more of these words, *reddend', reservand', solvend', faciend', inveniend'*, or such like. This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this

(1) Those things not being in his power, for they do not belong to him by law, 5 Cs. 12. b.

(2) See further by what words an exception may be made, the effect of it, and when it shall be void, in *Cem. Dig. Fait* (E. 5).

(3) Ante 51, note 1.

doth alwaies reserve that which was not before, or abridge the tenure of that which was before.

10. What shall be said a good reservation; and what not.

In every good reservation these things must alwaies concur. 1. <sup>a</sup> It must be by apt words. 2. It must be of some other thing <sup>a</sup> Flow. 13. Perk. Sect. 626. Co. l. 78.

issuing, or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3. It must be of such a thing whereunto the grantor may have resort to <sup>b</sup> Flow. 131. 78. <sup>c</sup> Co. l. 111. 8. 71. super Lit. 214. 213. 99.

Covenant.

distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed. As for examples, <sup>b</sup> If a man grant land, yielding and paying money or some such like thing yearly; this is a good reservation. But if the grantee covenant to pay such a sum of money, or to do such a thing yearly; this is no good reservation, but a covenant to pay a sum of money in grosse, and not as a rent.

(1). <sup>c</sup> If a lease be made for years, rendering a rent to the lessor or his heirs, in the disjunctive; or rendering a rent to the lessor, without saying [and his heirs, &c.]; or rendering a rent during the said term, and doth not say to whom; or rendering 10*l.* to the lessor, and 5*l.* to his heirs; all these reservations are good. But if a lease be made, rendering rent to the heirs of the lessor; this reservation is void because the rent is not reserved to himself first.

<sup>d</sup> If one grant land, yielding for rent, money, corn, a horse, spurrs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grats, or of the vesture of the land, or of a common, or other profit to be taken out of the land; these reservations are void. <sup>e</sup> If one grant a manor, messuage, land, meadow, or pasture, or the vesture or herbage of land, meadow, or pasture, rendering a rent; this is a good reservation. But if one grant tithes, rents, commons, advowsons, offices, a corody, mulcture of a mill, a faire, market, priviledge, or liberty, reserving a rent; this reservation is void. <sup>f</sup> And yet such a reservation in case of the King is good. And in case of a subject also, if a lease be made by deed in writing of any such thing for a term of years, reserving a rent; this may be good by way of contract to produce an action of debt, though not as a rent to be distrained for.

And thus by apt words, an apt rent out of manors, and such like memorable things, or divers rents, may be reserved upon one grant. As if one grant the manors of A. B. and C. rendering for A. 20*s.* for B. 20*s.* and for C. 20*s.* these are good rents, and several. So if one grant the manors of A. B. and C. rendering 3*l.* viz. for A. 20*s.* for B. 20*s.* and for C. 20*s.* this is a good reservation; but in this case the rent is entire (2). Also one may reserve one rent one year, and another rent another year; as 10*s.* one year, and 20*s.* another year: or one may reserve a rent to be paid every second, or third year, and no rent the other years; or one may reserve one kind of rent one year, and another kind of rent another year; and these reservations are good. And these reservations may be by fine, as well as by deed; or it may be in case where the lessor hath a reversion of the land, or upon a partition to make an equality, without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. <sup>g</sup> If two joynt-tenants joyn in the grant of their land by deed indented, and

(1) See accordingly *Arbore v. Heming*, 1 Roll. Rep. 80. 2 Bullf. 281. S. C.

(2) And if A. makes a lease of three manors, rendering 10*l.* rent, (viz.) 5*l.* out of one, and 5*l.* out of another; this will be a good lease and reservation, and the third shall be discharged. *Moor* 880.



the rent is reserved to one of them; this is a good reservation, and shall go to him alone. But if it be by word, or by deed poll, that the lease is made, the rent shall go to them both. \* And if a man possessed of a term, joyn his wife with him, and they both assign over this term by indenture, rendring a rent to them two, and the survivor of them, and she doth not seal the deed; in this case the reservation as to the wife is void. And if the reservation be of the rent to a stranger that is no party to the deed, and to him only, this reservation is void. And therefore if the father and his son and heir apparent, by indenture, lease his land for years, to begin after the father's death, rendring rent to the son, it is void.

A condition is a clause of restraint in a deed, or a bridle annexed and joyned to an estate, staying and suspending the same, and making it incertain whether it shall take effect or no. 10. Condition, *Quid*.

A warranty is a clause or covenant made in a deed by the one party unto the other, whereby the feoffor, donor, or lessor, doth, for him and his heirs, grant to warrant and secure land granted to the feoffee, donee, or lessee, and his heirs during the estate. 11. Warranty, *Quid*.

A covenant is a clause of agreement contained in a deed, whereby either party is bound to do, perform, or give something to the other. And of all these see at large afterwards. 12. Covenant, *Quid*.

In the construction of deeds it must be considered, 1. How a deed in the gross shall be taken and enure. 2. How it shall be taken and expounded in the several parts and pieces of it. And for the first, these rules are to be known; 1. If divers joyn in a deed, and some are able to make such a deed, and some are not, this shall be \* said to be his deed alone that is able; as if divers joyn in the grant of a thing by deed, and one alone hath all the estate, and the rest have nothing in the thing granted; it shall be said to be his grant alone that hath the estate. And so *e converso*. If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable. 2. A deed that is intended and made to one purpose, may enure to another; for if it will not take effect that way it is intended, it may take effect another way. And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *e converso*. And if a man have two ways to pass lands by the common law, and he intendeth to pass them one way, and they will not pass that way; in this case *ut res valeat* it may pass the other way. As if a man be seised of two acres of land in fee, and letteth one of them for years, and after intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery of the acre in possession in the name of both the acres; in this case the acre in possession only doth pass; but if the lessee of the other acre attorn, then the reversion of that acre will pass also. But where a man may pass lands by the common law, or by raising of a use, and settling it by the statute, there in many cases it is otherwise. As if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; in this case no use shall arise to the son. So if a man, in consideration of marriage, make a feoffment with a letter of attorney to give livery, and no livery is made; in this case no use will arise. And so it was held by Chief Justice Pop-

bam, B. R. for the intention of the parties doth work much, in

13. How and to what purpose a deed of grant in gross shall enure and be construed and taken. \* P. 82.

*this holds true of an use.*

*Quare istud et the following cases for as a bargain and sale without mortgage may operate as a covenant to stand seised provided the bargain be without issue of blood there can no man say a feoffee without livery should have the same effect.*

in the raising and direction of uses. And therefore it is said, that when a man doth intend to pass land one way, it shall never pass another way, contrary to his intent; as if one covenant for good considerations to levy a fine of land to the use of J. S. and his heirs, if no fine be levied, no use shall arise upon the covenant. If one by the words, bargain and sell, give and grant, make a feoffment of his house for money, and intending to pass it by way of bargain and sale and inrolment, the deed being made, there being a Master of the Chancery in the house whereof the feoffment is made, he doth acknowledge and deliver the deed before him; in this case if the deed be not inrolled, the conveyance is void, and that delivery shall not amount to a livery of seisin. And yet when the intent is apparent to pass it one way, or another, there it may be good either way; as where one doth make a feoffment in fee, with a letter of attorney to make livery; and in the same deed doth covenant, in case livery of seisin be not had to perfect the deed, to stand seised to the uses of the feoffment; in this case, albeit no livery of seisin be made, or attornment had, to perfect the feoffment or grant, yet if it be in such a case where there is a consideration sufficient to raise the uses by the covenant, the uses will arise by the covenant (1). 3. When a deed may enure to divers purposes, he to whom the deed is made, shall have election which way to take it, and he may take it that way as shall be most for his advantage. As if a deed of grant be made by the words *dedi & concessi*; this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the choice of the grantee to plead or use it the one way or the other. So if a lease for years be made to me of land for money, by the words demise, grant, bargain, and sell; I may take and use this by way of bargain and sale, or by way of demise, at my pleasure. So if one have a rent out of land whereof I and my wife are jointly seised, and he doth by his deed release, give and grant this rent to me; in this case, I may use this as a release to extinguish the rent, or as a grant of the rent, as it may make most for my advantage. *Et sic de similibus*. But where any inconvenience may grow by such an election, there the grantee shall not have an election, but it shall enure as it may; as, where a man may pass land by the common law, or by raising of an use and settling it by the statute, there sometimes it is so. And therefore if in the same case before, a father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; hereby no use will arise to the son, as it will in case of a covenant. And if a lease for years be made of a manor, by the words bargain, sell, demise, and grant, and this is to begin at a day to come; in this case it must pass entirely as a demise at the common law, or entirely as a bargain and sale, and the lessee hath not election to take or use it otherwise, or to use it for part one way, and for part another way. 4. It shall enure as much as may be according to the apparent intent of the parties. And therefore it is, that if a feoffment be made of a manor with an advowson appendant; or a bargain and sale of land in possession, and land in reversion together, be made; and the feoffment is not well executed for want of livery

(1) See accordingly *Bag. Use of the law*, 151. *Gilb. Law of uses* 84. *post.* 165. and fully in the letter on Uses.

(1) See accor

of feisin or attornment, or the deed of bargain and sale is not inrolled; in these cases, albeit the advowson may pass without livery or attornment, and the reversion without inrolment, yet because the intent doth appear to be that all shall pass together, therefore neither the advowson, nor the reversion, will pass by this deed.

5. When a deed is made, it shall enure as it may, and so as it may have and take the most and best effect that may be according to reason; as if tenant for life, or years, and he in remainder or reversion in fee, join in a feoffment by deed; this shall enure in the first case as the lease of the tenant for life, and the confirmation of him in the remainder or reversion, and in the last case as the feoffment of him in the reversion, &c. and the surrender of the lessee for years to the feoffee; and no forfeiture of the estate in the lessee for life. But if in this \* case the feoffment be by word, it seems \* P. 84.

it shall enure first as a surrender of the estate of the tenant for life, and then the feoffment of him in reversion, *ut res valeat*. And if *A.* be tenant for life, the remainder to *B.* for life, the remainder to *D.* in taile, the remainder to the right heirs of *B.* and *A.* and *B.* join in a feoffment by deed, in this case, this is the feoffment of *A.* and confirmation of *B.* but a forfeiture of both their estates, whereof the tenant in taile may take present advantage (1). If tenant for life grant a rent charge to him in reversion in fee, and he by his deed doth grant this rent over to another and his heirs; this is a good grant and confirmation also, to make the rent pass to the second grantee in fee simple. So if a disseisor make a lease for life, the remainder to the disseisee, and the disseisee doth grant the remainder over; this is a good grant and confirmation also.

If *A.* do bargain and sell his land to *B.* by indenture, and before inrolment they do both grant a rent charge to *C.* by deed, and after the indenture is inrolled; in this case, after the inrolment this shall be said to be the grant of *B.* and the confirmation of *A.* and if the deed be not inrolled, it shall be said to be the grant of *A.* and confirmation of *B.* \* If one makes a charter of feoffment of one acre of land to *A.* and his heirs, and another deed of the same acre to *A.* and the heirs of his body, and deliver feisin according to the form and effect of both deeds; it seems this shall enure by moieties, viz. he shall have an estate taile in the one moiety with the fee simple expectant, and a fee simple in the other moiety. If two severall tenants of severall lands join in a lease for years by deed indented; these be severall leases, and severall confirmations from each of them from whom no interest passeth, and doth not work by way of estoppel.

If *B.* tenant for life of *C.* and he in remainder, or reversion in fee of the same land, join in a lease for life, or years, by deed indented; this shall enure during the life of *C.* as the lease of *B.* and the confirmation of him in reversion, or remainder, and after the death of *C.* as the lease of him in reversion, or remainder, and the confirmation of *B.* without any estoppel. \* If tenant in taile, and he in reversion, grant a rent charge in fee, it shall be taken to be the grant of the tenant in taile, and the confirmation of him in reversion; but when the tenant in taile dieth without issue, it shall be taken to be the sole grant of him in reversion. If two jointenants be in fee of an acre of land, and they lease it to a stranger for life, and the lessee grant his estate

*It must be the same deed, for if A first feoffeth the estate of B is divided and turned to a right so that he could not know a feoffment. A recovery suffered by A & B in this case would have been no forfeiture but would have operated on B's estate in fee. Smith v Clifton 1 Ks.*

*The enrollment here has relation back, and makes good the same act, of the bargain. But the Barg. & Sale of Common of a Bankrupt under the Statute does not operate at all until enrollment & if one common dies before, the conveyance is bad Estoppel.*

*For there can be no estoppel where an intent passes to the 45.*

(1) See accordingly. *Co. Lit.* 251. b.—



to one of the lessors; in this case it seems it shall enure for a moiety by way of grant, and for the other moiety by way of surrender.

If there be Lord and tenant, and the Lord grant his feignory Perk. Sed. 81. Dier. 140. to his tenant, and to a stranger; this shall enure for a moiety to the tenant by way of extinguishment, \* and for the other moiety to the stranger by way of grant. If tenant for life of the grant of a woman sole, grant his estate to the husband of the wife, this shall Perk. Sed. 82, 83. enure for the whole by way of grant.

\* P. 85.

If a lease be made for life, the remainder for life to a stranger, and the lessee grant his estate to his lessor, this shall enure by way of grant. If there be Lord and two joynt-tenants in fee, and the Lord grant his feignory to one of his tenants in fee; it seems this shall take effect for the whole by way of extinguishment. If there be lessee for life, and the reversion descend to two coparceners, and one of them take a husband, and the lessee grant his estate to the husband and wife; this shall enure by way of grant for the whole. If the disseisee, and the heir of the disseisor (being in by

for the heir has title, but if it had been by the disseisor himself and all heirs then it would have been the possession of the disseisor & confirmation of the disseisor.

descent,) make a feoffment by one deed, and livery of seisin thereupon; this is the feoffment of the heir only and the confirmation of the disseisee (1). 6. If one have divers estates in land, and he make any charge or grant upon or out of it; this shall issue out of all his estates. And if one have a possession and an ancient right, and grant a rent charge out of the land, or make a lease of the land; this shall issue out of both the estates, and it shall enure

Co. super Lit. 372. Co. 7. 14. 147, 148. 5 E. 4. 2.

from him having several estates, as it shall enure from several persons having the same estates. *Quando duo jura concurrant in una persona, æquum est ac si essent in diversis.* 7. If one that hath a rent charge out of a manor, by grant reciting his grant, grant the same rent to a lessee for life of the manor out of which the rent doth issue, to have and perceive to him and his heirs, and surrender to him the deed; this shall not enure to extinguish the rent, but by way of grant, of which the heir of the lessee for life may take advantage, if he do not by granting away the rent, purchasing the reversion of the manor, or making a feoffment of the manor, and thereby committing a forfeiture, or by some such like means prejudice himself; for by these means the rent will be extinct and determined. If a disseisor grant a rent to the disseisee, and he by his deed doth grant it over to another; or the disseisor make a lease for life, or gift in tail, the remainder to the disseisee, and the disseisee doth grant over this remainder, and the tenant attorn; these grants of the disseisee shall be taken for a grant and a confirmation also, *ne res pereat.* If there be Lord and tenant of white acre and two other acres, and the Lord grant by deed to his tenant that he will not distrain his tenant in white acre for his service; this grant shall not enure to determine the feignory in any part, but as a covenant, so that if he do distrain in white acre, the tenant may have an action of covenant. If a man have a wood of 200 acres, and he grant it to another for life or years, and that he shall cut therein four or five acres every year; in this case, albeit the wood be granted and the grant shall enure to pass it, yet the

Perk. Sed. 592.

Co. super Lit. 302.

Perk. Sed. 69.

Mich. 37. 38. E. 3. B.R. Curia.

\* P. 86. grantee can \* cut no more but four or five acres by the year;

(1) What is deemed a disseisin, see *Co. Lit. 153. 181. F. N. B. 177.* The consequences of actual disseisin, considered as such, continue law to this day: the disseisee cannot dispose, or devise; the disseisor takes away his entry. *per* *Ld. Mansfield* in *1 Burr. 112.*

Co. super Lit. 313. Lit. Sect. 563. Plow. 160. 154.

Doct. & Stud. 39. Lit. cap. 1.

Plow. 161. 16 H. 8. 10. Dier 15. Fitz. Barre. 237. Bro. Don. 14. 17 E. 3. 7. 46 E. 3. 17.

(1) See a

And

And yet the grantor, as this case is, cannot himself cut any of the wood during the time; as in case where a man doth grant to another, that he shall cut every year four or five acres in such a wood: for in this case the grantor may notwithstanding cut as much as he will. And here note, that in all the cases before, according to the construction that the law makes of the deed, so must the party, that is to use it, set it forth and plead it; as when it shall enure as a lease, then it must be pleaded as a lease, &c. See more in *release*, numb. 9. *surrender*, numb. 7. *confirmation*, numb. 7.

In the construction of deeds it must be observed, that there are some general rules that are applicable to all the parts of all kinds of deeds, and some that are applicable only to some kind of deeds, and to some part of the deed only. In the construction therefore of all parts of all kinds of deeds, these rules are universally observed:

1. That the construction be favourable, and as near to the minds and apparent intents of the parties, as possible it may be, and law will permit: for *benigne sunt faciendæ interpretationes chartarum propter simplicitatem laicorum. Et verba intentioni non è contra debent inferuire*. As, if there be Lord and tenant, and the tenant grant the tenements to one man for term of his life, the remainder to another in fee, and the Lord grant the services to the tenant for life in fee; in this case, howbeit a grant may enure by way of release, and a release to the tenant for life shall enure to him in remainder, and is an extinguishment, yet, because this is contrary to the intent, it shall be taken for a suspension only of the services during the life of the tenant for life, and the services shall go afterwards to his heir. But if the intent of the parties be apparently against law, then the construction shall not apply the deed to their intent: as if one give land to another and his heirs for twenty years; in this case the executor, and not the heir, shall have this land after the death of him to whom it is given. So if one by deed intending to give land to another and his heirs, give the land to him, to have and to hold to him, or to him and his assigns, for ever, without these words [and his heirs] this is but an estate for life at the most.

2. That the construction be reasonable and according to an indifferent and equal understanding: and therefore if I grant to another, common in all my manor, this shall be expounded to extend to commonable places only, and not in my gardens, orchards, &c. And if I grant to one estovers out of my manor, he may not by this cut down my fruit trees. And if one grant me (a Barrister) a fee *pro consilio*; this shall be taken for counsel in law only. And so in case of a physician. And if one grant to me to dig in all his lands for tinne; I may not by this grant dig under his house. And if one grant me common for all my beasts; this shall be taken for all my commonable beasts, and not for goats and the like. And if one grant me all his trees in his manor; by this I shall not have his apple trees (1). And if one lease to me his house and land, to the end that I may make profit thereof in the best manner; by this grant I may not prostrate the house or make waste.

14. How a deed of grant shall be construed and taken in all the parts and branches thereof.  
General rules.

*but see the new title cut as to be begun by this*

\* P. 87.

*Bro. Tit. Grant 16 Wyndham v Way 4 Term. 116.*

(1) See accordingly *Hob. 304.*

3. That too much regard be not had to the native and proper definition, significations, and acceptance of words, and sentences, to pervert the simple intentions of the parties: for a manor may pass by the name of a messuage, or a knights fee, if it be used so to be called: *Et sic è converso*, a messuage by the name of a manor: a remainder may be granted by the name of a reverter; a reversion by the name of a remainder: for the law is not nice in grants, and therefore it doth oftentimes transpose words contrary to their order, to bring them to the intention of the parties (1): and it is a rule of law, *Mala grammatica non vitiat chartam*, neither false Latine, nor false English, will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative, when the apparent intent is contrary. And it is another rule of law, *falsa orthographia non vitiat concessionem*.

4. That the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus & consequentibus est optima interpretatio*: for *Turpis est pars quæ cum suo toto non convenit*. *Maledicta expositio quæ corrumpit textum*. If a man make a feoffment of all his land in *D.* with common in *omnibus terris suis*; this common shall be intended in the lands granted in *D.* only, and not elsewhere; for it must be understood *secundum subjectam materiam*.

5. That the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made (2); so as when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other: *Verba debent intelligi cum effectu*. *Et benigne faciendæ sunt interpretationes, ut res magis valeat quam pereat*. And therefore if an annuity be granted *pro consilio impendendo*, or a feoffment made *ad erudiendum filium*, or *ad solvendum* these shall be construed conditionall grants without any words of condition; for otherwise the party will be without remedy.

6. That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party: *Verba Chartarum fortius accipiuntur contra proferentem*: *Et quælibet concessio fortissime contra donatorem interpretanda est* (3). \* And therefore if one seiled of land in fee grant it to another, and say not for what time, this shall be taken an estate for life. But this is to be understood with this limitation, that no wrong be thereby done, for it is a maxim in law, *quod legis constructio, non facit injuriam*. And therefore if tenant for life grant the land he doth hold for life, to another, and doth not say for what time; this shall be taken

\* P. 88.

(1) "For the words are not the principal things in a deed, but the intent and design of the grantor. And the words are to be construed in a manner most agreeable to the meaning of the grantor; and words which are merely insensible, are to be rejected. 3 Atk. 136. per Ld. Ch. J. Willes, who there lays down some general rules for the construction of deeds.

(2) This is a rule both in law and equity, per Ld. Cr. Parker, 1 Pr. Wms. 457.

(3) This rule must be understood with a restriction; for a distinction should be made between an indenture, and a deed poll: the latter is executed by the grantor alone, and the words are his only, and shall therefore be taken most strongly against him; but in an indenture executed by both parties, they are to be considered as the words of them both. Plo. 134. this rule from its strictness, and rigor, is last to be resorted to; and is never to be relied on, but where all other rules of exposition fail. Elem. reg. 3.



an estate for his own life, and not the life of the grantee, for then it would be a forfeiture. So if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple, or for life; by this grant shall pass no more but the lands he hath in fee simple. So if a man have a house, wherewith there hath been copy hold land, and other land, usually occupied; and he let this house and all his land thereunto belonging; in this case, and by this demise, the copy hold land doth not pass; for in both these cases then there would be a forfeiture. But otherwise by these words all the land in both cases would pass.

7. That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some speciall reason to the contrary; and therefore herein a deed doth differ from a will, for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received (1).

8. That which is generally spoken, be generally understood; unless it be qualified by some speciall subsequent words, as it may be: for if one be seised of a manor wherein there is a park, and he grant the manor with the custody of the park; by this the park will not pass.

9. That if the words may have a double intendment, and the one standeth with law, and the other is against law, that it be taken in that sense which is agreeable to law: and therefore if tenant in tail make a lease of land to B. for term of life, and do not mention for whose life it shall be; this shall be taken for the life of the lessor, and not for the life of the lessee, as it shall be if such a lease be made by tenant in fee simple.

10. That things doubtfully set down, be applied to him to whom they do properly belong: as if I. S. make a feoffment to one of his own name, and there is a covenant in the deed that I. S. shall deliver the deeds, this shall be taken of I. S. the feoffor, and not I. S. the feoffee.

11. That such a construction be made of abbreviations, as the deed may not lose its force: as if one grant *tot' ill' Maner' de D. & C.* if it be but one manor, the words shall be taken for *totum illud manerium*; if two manors, then it shall be taken for *tota illa maneria*. And here note that most of all these rules run through all the cases of exposition hereafter following (2).

\* † Touching things granted, these rules are first to be known.

1. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass *inclusive*, together with the thing, by the grant of the thing a

*so granted in tail*

*Rose v. Bantlett*

*Co. Lan. 299 2*

*1 Att. 86*

*Thompson v. Bantlett*

*2 Bos. & P. 315*

*Chapman v. Hant*

*2 Ves. Sen. 271.*

*If a man having*

*fee simple in land*

*lands devises all his*

*lands to A by will*

*not attended by three*

*witnesses within half*

*an acre*

*of land*

*shall be taken*

*for a lease for life*

*of the land*

*if the will*

*be not proved*

*by three*

*witnesses*

*within half*

*an acre*

*of land*

*shall be taken*

*for a lease for life*

*of the land*

*if the will*

*be not proved*

*by three*

*witnesses*

*within half*

*an acre*

*of land*

*shall be taken*

*for a lease for life*

*of the land*

*if the will*

*be not proved*

*by three*

*witnesses*

*within half*

*an acre*

*of land*

*shall be taken*

*for a lease for life*

*of the land*

*if the will*

*be not proved*

(1) Which is owing to the different natures of the two instruments; for the first deed, and the last will, are most available in law, *Hard. 94. 1 Vern. 30.* but different opinions having been formed of the operation of repugnant clauses in a will, those opinions are considered, and the authorities relating to them collected, by the Editor of the 13th. edition of *Co. Lit.* in note 1. 112. b. and in the margin of the 13th. edition of *Plow. 541.* See further how deeds are to be expounded, where there appears to be a repugnancy in the words of them, in *Bac. Abr. Grants (1).*

(2) Further as to rules for the construction of deeds and wills, see *Plow. 160. Lilly's Prac. Conv. 152. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*

itself, without the words *cum pertinentiis*, or any such like words. *Cuicunque aliquid conceditur, conceditur etiam & id sine quo res ipsa non esse potuit.* As by the grant of consufance of pleas, is granted the ordinary proceffe to bring causes to judgment. By the grant of a ground, is granted a way to it (1). By the grant of trees is granted withall power to cut them down and take them away (2). By the grant of mines, is granted power to dig them; and by the grant of fish in a man's pond, is granted power to come upon the banks and fish for them (3).

2 The incident, accessary, appendant, and regardant, shall in most cases pass by the grant of the principall, without the words *cum pertinentiis*, but not *à converso*; for the principall doth not pass by the grant of the incident, *Ecce Accessorium not ducit, sed sequitur, suum principale.* And therefore by the grant of a reversion without naming the rent, a reversion after an estate tail, for life, or years, and the rent reserved upon the estate, will pass, so as the tenant return to the grant: but by the grant of the rent the reversion will not pass. So by the grant of a manor, the Court Baron thereunto belonging will pass; by the grant of a house, or ground, the ways thereunto belonging do pass; by the grant of arable land, the common appendant thereunto will pass; by the grant of mills, the waters, flood gates, and the like that are of necessary use to the mills do pass; by the grant of a house, the estovers appendant thereunto will pass; by the grant of a manor, the advowsons appendant, and villaines regardant thereunto, pass; by the grant of a faire, the Court of Piepowders will pass; by the grant of homage, or rent, the fealty will pass; and by the grant of escuage, homage and fealty will pass. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, estreaies, and the like, these will not pass by the grant of those other things; and therefore if one have a warren in his land, and grant the land, by this the warren doth not pass. And yet if in these cases, he grant the land *cum pertinentiis*, or with all the profits, priviledges, &c. thereunto belonging; by this grant perhaps these things may pass. And here know, that a reversion may be parcell of, or appendant to, a thing in possession, and pass by the grant of it; but a possession cannot be parcell of, or appendant to, a thing in reversion. And therefore if one make a lease for life of a manor, excepting twenty acres of it, and after grant the reversion of the manor; by this grant the twenty acres will not pass. So if one be disseised of an acre, parcell of a manor, or of common appendant to the manor, and before an entry or recontinuance of the acre, or common, he grant the manor to a stranger; by this the acre of land, or common, will not pass: but otherwise it is in case where a lease for years only is made of, a parcell of the manor. And if a lease be made for life, of twenty acres, parcell of a manor, and after the manor itself is granted; by this the reversion of the twenty acres is granted and will pass also.

\* P. 90.

(1) By operation of law; as if a man grants a piece of ground in the middle of his, he at the same time impliedly grants a way to come at it, and the grantee may cross his land for that purpose without trespass; and if the grantee is obstructed, he has a remedy by action of assize of nuisance, or on the case. F. N. B. 183.

(2) And you may come with carts over my land to carry them away. 11 Co. 52. a.

(3) And he may justly doing so; but he cannot justify the digging a trench to let the water out to take the fish, for he may take them by nets, and other devices; but if there were no other means to take them, he might dig a trench. Finch's Law 63.

(1) When what shall be  
(2) Land be  
thing will pass  
(3) Where  
with another,  
of another, as  
Rill, dbr. 58.  
Where the  
all their  
as jointly.

And if a man make a feoffment in fee of an acre of land parcell of a manor, and after repurchase it, and then grant the manor; this acre will not pass by this grant; for it is not united by the new purchase. But it is otherwise of trees; for if a man make a lease for life of a manor, or other land, excepting the trees, and after grant the reversion of the manor, or land, to another; hereby the trees do pass. And if a man make a feoffment in fee of a manor, excepting the trees; and after, the feoffee buy the trees, in this case the trees are united again, so that if the feoffee sell the manor, the trees shall pass with it. If I lease an acre of land to which an advowson is appendant, for term of life, reserving the advowson, and after do grant the reversion of that acre with the appurtenances; hereby the advowson doth not pass (1). But if I grant the advowson for term of life, reserving the acre, and after grant the acre, with the advowson, *cum pertinentiis*; by this the advowson doth pass. If land be appendant to an office, there by grant of the office with the appurtenances, the land will pass without livery of seisin. And if an office be appendant to land, there by the grant of the one, the other will pass. 3. That which is parcell or of the essence of a thing, albeit at the time of the grant it be actually severed from it, doth pass, by the grant of the thing itself. And therefore by the grant of a mill, the millstone doth pass, albeit at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys, do pass as parcell of it, albeit at the time of the grant they be actually severed from the house. 4. By the grant of the land, or ground itself, all that is *supra*, as houses, trees, and the like is granted; for *Cujus est solum, ejus est usque ad cælum*; also all that is *infra*, as mines, earth, clay, quarries, and the like (2). And by the grant of a house, the ground whereon it doth stand doth pass. 5. When any matter of interest, or profit, is granted, the grant shall be taken largely: but when any matter of ease, or pleasure only, is granted, as a walk, or the like, the grant shall be taken strictly. 6. When a man doth grant all his lands, or all his goods; by this grant doth pass not only what he is sole seised, or possessed of, but also what he is jointly seised, or possessed of, with another (3). And so *e converso*. If two men joyn together and grant all their lands, or all their goods, hereby do pass not only all they have jointly and together, but all those they have sole and apart. 7. Some words in \* deeds are large, and have a general extent; and some have a proper and particular application; the former sort may contain the latter; as *Dedi*, or *Concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender: and it is in the election of the party to whom the deed is made, to use it to which of these purposes he will. And hence it is, that if a Lord by the words of *Dedi & concessi* grant to his tenant that doth hold of him, his rent; or one

Doer Bitt  
1 TR. 701-3

15 Vin. 109  
w. H. 2  
Plead. Com. 289  
\* P. 91.

(1) When an advowson shall be appendant, or in gross, see in *Com. Dig.* Advowson (B. and further what shall be deemed to pass as appendant, appurtenant, or incident, in *Eac. Abr.* Grants (I. 4).

(2) Land being *Nomen generalissimum*; whereas by the name of a messuage, castle, or the like, nothing will pass but what falls with the utmost propriety under the term made use of. *Co. Lit.* 4. a.

(3) Where a man grants *all his goods and chattels*, not only those pass wherein he is jointly possessed with another, as an obligation wherein he is joint obligee; but those also which he is possessed of in right of another, as a term of years, which he has in right of his wife, or goods which he has as executor. *Roll. Abr.* 58. Grants (X). 1 *Leon.* 263.

that  
When the Assignees of a bankrupt partner bargained and sold  
all their goods and chattels, it passed what they took actually as well  
as jointly.



*But the tenant must have as large estate in the land as in the rent granted.*

The terms, whereby things are granted, expounded.

Hereditament.

*do leasehold property by the word fee simple, or the estate but the subject matter is the land.*

Tenement.

*quasi an estate in house will pass by the word Land.*

Note.

Forfeiture.

\* P. 92.

that hath a rent charge out of land, doth grant it to the tenant of the land; in these cases the rent is extinguished, albeit it be by way of grant. But a release, surrender, confirmation, &c. cannot amount to a grant, &c. nor a surrender to a confirmation or a release, &c. because these be proper and peculiar manner of conveyances, and are distinguished to a special end.

Amongst words whereby things do pass, some are collective, compound, or general, comprehending many things, as hereditaments, lands, tenements, honors, isles, villages, and the like, including lands of several sorts and qualities. And some words are simple or particular, as meadow, pasture, wood, moor, and the like.

The word [hereditament] is of as large extent as any word, for whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixt, is an hereditament. By the grant therefore of all hereditaments, do pass honors, isles, castles, feignories, manors (1), messuages, lands, meadows, pastures, woods, moors, marshes, furses, heaths, reversions, commons, rents, vicarages, advowsons in gross, and the like things, which the grantor hath in fee simple at the time of the grant, whether he hath it by purchase or descent (2). And the word [tenement] is of large extent also, and it seems doth comprehend as much as the former. And therefore by the grant of all tenements, will pass, as much, as by the grant of all hereditaments (3).

The word [land] strictly doth signifie nothing but arable land; but in a larger sense it doth comprehend any ground, soil or earth whatsoever. And therefore by the grant of all lands, do pass arable lands, meadows, pastures, woods, moors, waters, marshes, furses, heath, and such like, and the castles, houses, and buildings thereupon; but not rents, advowsons, and such like things. Also by grant of any land in possession, the reversion thereof will pass. And yet by the grant of a reversion of land, the land in possession will not pass.

But here it must be observed, that in cases of grants, and gifts of all hereditaments, tenements, or lands, consideration is had of the estate of the grantor: for if a man be seised of some lands in fee, and have other lands for life, or years, only, and all these are lying within one parish, and he grant all his lands, tenements, or hereditaments in this parish, to another in fee simple, fee tail, or for life, \* and give livery of seisin in the lands whereof he is seised in fee, in the name of all the rest; by this doth pass no more but his lands whereof he is seised in fee; for otherwise it would be a forfeiture for those lands. But if the livery of seisin be made in any part of the lands he hath for life or years, then that part wherein the livery is made will pass, and no more. And if the conveyance be by bargain and sale, and deed inrolled, then the lands whereof he is seised in fee simple, and for life, shall pass, and not the land he hath for a term of years. And yet if in this case the

(1) There is no question but a manor may pass by the word hereditament, *per* *Ld. Hardwicke*, in *Norris and Le Neve*. 3 Atk. 82. *on tenement* 15 Vin. 226 *on land* 8 Taunt 699

(2) Therefore an heir loom, tho' neither land nor tenement, but a mere movable, yet being inheritable, is comprized under the general word hereditament; and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. 3 Co. 2. *it is a deed in a husband*.

(3) This description of the word tenement does not agree with *Ld. Coke* in 1 Inst. 6. a. where he says tenement is a large word to pass land, &c. but hereditament is the largest.

grant

Co. super Lit. 5.

Plow. 169.

Co. super Lit. 5. Plow. 168.

Co. super Lit. 5. 58. Perk. Sect.

116. Co. 5. 11. Plow.

168. Dyer 233. 14 H. 8. 1.

9 Jac. B. R. Dier 30. 8 H. 7. 4.

a Banton's case, M. 9.

Co. super Lit. 5. 26. Aff. Plow. 54.

E. 3. 36.

Co. super Lit. 5. Plow. 168.

17 E. 3.

Co. super Lit. 5.

Plow. 167.

(1) A. poss.

grant, bargain

and the life of

ed in fee, the

the premises t

operate as a lo

he heirs of th

great himself

80. S. C.

(2) See acco

(3) Lawe-d

Edw. 2. ca.

only used for

(4) in differ

Sp. etc. Knig

grant be for years, then all the lands will pass, for then there will be no forfeiture in the case. Howbeit it is said in *Bro. done Forfeiture*.

41. *pro lege*. That if a man give or grant all his lands and tenements in *B.* by this, leases for years do not pass, and that these words do intend franktenements at the least (1). *vid. sup. l. 88 & 8*

Co. super  
Lit. 5.

These words [*Honor, Isle, and Commote*] are compound words and of large extent. And therefore, by the grant of them, may pass one or more seignories, manors, and divers other lands. Also a castle may contain one or more manors. And therefore by the grant of a castle, may pass one or more manors. And so sometimes *à converso* a castle may pass by the grant of a manor. But by a castle most commonly is signified no more but the house or building, and the parcel of ground inclosed wherein it doth stand (2).

Honor. Isle.  
Commote.  
Castle.

Plow. 169.

This word [village or town] is of large extent also. And by the grant of it, a manor, land, meadow, and pasture, and divers such like things may pass.

Town or  
Village,

Co. super  
Lit. 5. Plow.  
168.

This word [manor] is a word of large extent; and may comprehend many things. And therefore by the grant of a manor, without the words of *cum pertinentiis*, do pass demesnes, rents, and services, lands, meadows, pastures, woods, commons, advowsons appendant, villains regardant, courts baron, and perquisites thereof, that are in truth at the time of the grant parcel of the manor. \* But nothing that in truth is not parcel of the manor, albeit it be so reputed, will pass by the grant of the manor; and therefore if one have a manor, and after purchase the lawday (3), or a warren to it, and then he grant away the manor, hereby the lawday, or the warren, will not pass. And yet if by union time out of mind, they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may pass. <sup>b</sup> By the grant of a manor, also divers towns may pass. An honor also may pass by this name. And so also may a castle, or a hundred. And one manor also, that is parcel of another manor, may pass by the grant of that manor, whereof it is parcel.

Manor.

Co. super  
Lit. 5. 58.  
Perk. Sect.  
116. Co. 5.  
11. Plow.  
168. Dyer  
233. 14 H.  
8. 1.  
9 Jac. B. R.  
Dier 30.  
8 H. 7. 4.  
Banton's  
case, M. 9.

Co. super  
Lit. 5. 26.  
Aff. Plow. 4.  
E. 3. 36.

The word [knights-fee] is a compound word also, and may comprehend many things. And therefore by the grant of this may pass land, meadow, and pasture, as parcel of it. And sometimes \* by this, doth pass so much land as to make a knights fee. \* P. 93. And some say it doth contain eight hides of land (4). And it seems also that a manor may pass by this name, if it be usually called so.

Co. super  
Lit. 5. Plow.  
168.  
17 E 3.

Co. super  
Lit. 5.  
Plow. 167.

The word [grange] is a compound word also, and by the grant of a grange, will pass a house, or edifice, not only where

Grange.

(1) *A.* possessed of lands for a term of 999 years did for valuable consideration, by lease and release, grant, bargain, sell and demise, to trustees and their heirs, to the use of himself and his wife for their lives, and the life of the survivor of them, remainder to the heirs of the wife, and covenanted that he was seised in fee, the wife died without issue, having made a writing in the nature of a will, and devised the premises to *B.* and his heirs. *Id.* Chancellor was of opinion, that though the settlement could not operate as a lease and release, yet *A.* being in possession, and the word "granted" being in the release, it took effect as a grant or assignment of his whole interest at common law: and tho' it would not go to the heirs of the wife, yet it should go to her administrator it being clearly the husband's intention to divert himself of all his interest in the estate. *Marshall v. Frank. Gilb. Eq. Rep. 143. Prec. in Chan. 86. S. C.*

(2) See accordingly 2 *Inst.* 31. and further as to a castle, in *Mad. Baron. Anglic. 17.*

(3) *Lawe-day*, alias dicitur de visu franci plegii; vulgo leta: alias de curia comitatus, juxta stat. An. 1 Edw. 2. ca. 2. *Spel. Gloss.* This law-day or lage-day was properly any day of open court, and commonly used for the more solemn courts of a county or hundred. *Cow. Interp.*

(4) In different ages a knights fee was estimated at several values, 2 *Inst.* 596. See further *Cow. Inst.* 596. Knights fee. *Co. Lit.* 69. a. and *Mad. Baron. Angl.* 31, 183.

corn is stored up, like as in barns, but necessary places for husbandry also, as stables for hay, and horses, and stables and sties for other cattle, and a curtilage, and the close wherein it standeth, at the least. And where land, meadow, and pasture, &c. belonging to such houses are called all together by the name of a grange, there perhaps by this word the whole may pass

**Farme.**

The word [farme or ferme] called in Latine *firma*, is also a compound word, and doth comprehend many things. And therefore by the grant of a ferme, will pass a messuage and much land, meadow, pasture, wood, &c. thereunto belonging, or therewith used: for this word doth properly signifie a capital, or principal messuage, and a great quantity of demesnes thereunto appertaining. Also by the grant of all farmes, or all fermis, it seems leaves for years do pass.

Co. super  
Lit. 5.  
Plow. 195.

Bro. Grant.  
155.

**Oxgangs of land.**

The word (oxgang) is a collective word also, for by the grant of *unum bovatum terræ*, or of an oxgang of land, may pass land, meadow, and pasture, and it doth properly intend as much as an ox can till. And *Jugum terræ*, or half a plow-land, is as much as two oxen can till, and by the grant of half a plow land, may pass meadow, and pasture.

Co. super  
Lit. 5.

**Half a plow land.**

**A plow land or a hide of land.**

The words [plow-land, and a hide of land] are *Synonyma*, and are collective words also. And therefore by the grant of *Carucatum* or *Hidum terræ*, or of a plow-land, or of a hide of land, may pass 100 acres of land, meadow and pasture, and the houses thereupon; but it doth properly intend as much land as one plow can till in a year.

Co. super  
Lit. 5. Plow.  
167.

**A yard of land.**  
**Half a yard land.**

This word [a yard-land] is also collective, and doth comprehend many things, but it is not certain; for in some countries it doth contain twenty acres, and in some countries twenty-four acres, and in some countries thirty acres; by the grant therefore of *virgatum terræ*, or a yard land, will pass that quantity of land, meadow and pasture that is called by this name. And so by the grant of half a yard, or a quarter of a yard land (1)

Co. super  
Lit. 5.

**Fold course.**

The word [Fold course] is also compound, for by the grant of a fold course, lands and tenements may pass, *Et sic de similibus*. And finally by the grant of any such compound thing as before, for the most part there doth pass thereby so much as in common reputation is accounted part of that thing and is usually called by the name (2).

Co. super  
Lit. 6.  
Plow. 167.

**Parsonage, rectory, vicarage.**

By the grant of a rectory or parsonage will pass the house, the glebe, the tithes, and offerings belonging to it. And by the grant of a vicarage will pass as much as doth belong unto it, as the vicarage house, &c.

8 H. 7. 1.  
Bro. Grant,  
86.

**\* P. 94.**  
**Messuage.**  
**Curtilage.**

By the grant of a messuage, or a messuage with the appurtenances, doth pass no more than the dwelling house, barn, dovecot, house, and buildings adjoining, orchard, garden, and curtilage, i. e. a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, and houses adjoining to the dwelling house, and the close upon which the dwelling house is built, at the most. And so much also may pass by the grant of

Plow. 85. 15.  
171. 178.  
569. Lit.  
Bro. Sect.  
31. 185. C.  
super Lit. 5.  
Co. 10. 65.  
Kelw. 57.  
27 H. 6. 2.

(1) There are no certain number of acres contained in a hide or plough land, or yard land, or an oxgang of land. Co. Lit. 69. a. 2. Inft. 596.

(2) As to the dimensions of land in England, see the books referred to in note 11. to Co. Lit. 5. a. 13th edit. and if the reader is desirous to investigate the etymologies of the several words, by which things will pass in conveyances, he will find the proper books pointed out, in note 3 to Co. Lit. 6. a. 13th edit.

a See before.

b Lit. Bro. Sect. 185.  
160. Bro. Leaves 55.  
Plow. 170.  
c13 Aff. Pl.  
Co. super.  
Lit. 4.

14 H. 8. 1.  
Perk. Sect.  
116. Co. 5.  
11. Br. Don.  
14.

Co. 5. 11. 11.  
50.

Curia Hill.  
16 Jac. B. R.  
Pinch-  
comb's case.

Dier 374.  
Co. 11. 48.



house. So that the quantity of an acre of ground, or thereabouts, in orchard, garden, and out-let, may pass by either of these names; but more than this will not pass by the grant that is made in either of these words, albeit more have been occupied with it, and albeit more be intended to be passed by the grant. And therefore if there be a messuage or dwelling house, and divers acres of land thereunto belonging, called all together by the name of Hedges, and a grant is made by these words, if all that messuage with the appurtenances commonly called by the name of Hedges; by this grant nothing shall pass but the messuage, garden, and curtilage. <sup>a</sup> And yet if a manor, or farme, be commonly called by the name of a messuage, there by the grant of a messuage the whole manor, or farm, may pass. <sup>b</sup> And by the grant of a messuage, or house, and all the lands thereunto appertaining, will pass all the land usually occupied therewith. Also by the name of a messuage, a chappell, or an hospitall, may be granted.

By the grant of a cottage, doth pass a little dwelling house that hath no land belonging to it.

By the grant of all a man's arable land, there doth pass no more but that kind of land: and by the grant of all a man's meadow ground, or all a man's meadows, doth pass no more but that kind of ground. And by the grant of all a man's pasture, doth pass no more but the land or ground it self employed to the feeding of beasts, and also such pastures and feedings as he hath in another man's soil.

If a man have divers acres of pieces of wood, and grant to another *omnes boscos suos*, or all his woods, or all his woods growing in such a place; by this grant doth pass all the high-wood and underwood, and not only the wood growing upon the land, or soil, but the land or soil itself wherein it doth grow. But in this case if the grantor have in the same place divers pieces of wood, and divers closes, wherein there are divers trees growing in the hedges; it seems in this case these trees in the hedges shall not pass by this grant in these words; especially if the case be so that the cutting of them will be a waste. And yet if the grantor have no pieces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this case it seems all the trees, except the apple trees, do pass, but not his hedges and hedge rows. And in \* case where the trees only do pass, as \* P. 95. where the grant is of all a man's trees, there shall pass no more of the soil but so much as shall serve for the nutriment of the trees, and the owner of the soil shall have the grass growing thereupon also. If a man grant to another all his saleable underwoods within his manor, which have been usually sold by the owners of the manor, with free entry, egress, and regress, for selling, making, and carrying the same away at all times convenient; in this case it seems the soil doth not pass but the wood only. And yet if those words with free entry, &c. be omitted, *contra*.

If one demise, grant, and to term let, a farm with all manner of timber-wood, underwood, and hedge rows, except the great oaks in such a close, to have and to hold the farm for twenty one years; in this case, albeit there be the word grant, and that the trees be not named again in the *Habendum*, yet the other trees do not pass by this grant, otherwise than in other leases, and if the lessee cut any timber to sell, it is waste in him.

A toft

<sup>a</sup> See before.

<sup>b</sup> Lit. Bro. Sect. 185. 160. Bro. Leases 55. Plow. 170. c13 Aff. Pl. 2. Co. super. Lit. 4.

14 H. 8. 1. Perk. Sect. 116. Co. 5. 11. Br. Done 14.

Co 5 11. 11. 50.

Curia Hill. 16 Jac. B. R. Pinchcomb's case.

Dier 374. Co. 11. 48.

A toft is a place where a meffuage hath flood, and by this name in a grant fuch a thing will pafs.

*Bruera*. *Bruera* is a heath, or heathy ground. *Frassetum* is a wood Co. Super  
*Frassetum*. or piece of ground that is woody. *Alnetum* is a wood of elders, Lit. 4. 5.  
*Alnetum*. or place where elders grow. *Sulicetum*, a wood of willows, or  
*Sulicetum*. place where willows grow. *Selda*, a wood of fallows, willows,  
*Selda*. or withies, or place where fuch things grow. *Filicetum* is a braky  
*Filicetum*. ground, or place where fuch things as fern grow. *Fraxinetum*,  
*Fraxinetum*. a wood of affhes, or place where affhes grow. *Lupulicetum*, a hop-  
*Lupulicetum*. yard, or place where hops do grow. *Arundinetum*, a place where  
*Arundinetum*. reeds grow. *Roncacia* or *Runcacia*, a place full of bryars or bram-  
*Roncacia*. bles. *Juncaria* or *Joncacia* or *Siampna* (which are all one) a  
*Juncaria*. place where ruihes do grow. *Rufcaria*, a place where kneeholm,  
*Rufcaria*. or butchers pricks, or broom doth grow. *Marifcus*, a fen or marfh  
*Marifcus*. ground. *Mora*, a more barren and unprofitable ground than a  
*Mora*. marfh. And by grant of thefe, and fuch like things, or of twenty  
acres of fuch ground, thefe particular kinds only or fo many acres  
thereof do pafs. *Vacaria*, is a dairy-houfe. *Porcaria*, a fwinefty.  
*Vacaria*. *Bercaria*, a tanhoufe: and by thefe names thefe things will pafs. Co. Super  
*Porcaria*. By the name of *Stagnum* a pool, or *Gurges* a gulf, the water, Lit. 5.  
*Stagnum*. land, and fifh in the water will pafs.

By the grant of *Stadium*, *Ferlingus*, or *Quarentena terra*, doth Co. idem.  
*Stadium*. pafs a furlong or furrow long, which anciently was the 8th part of a  
*Ferlingus*. mile. By the name of *felio* or *porca terra*, doth pafs a ridge of  
*Quarentena*. land, which is fometimes longer, and fometimes fhorter. By  
*terra*. the grant of an acre of land, doth pafs fo much as is an acre by  
*Sclio*. meafure in that country, by the ordinary account and meafure of  
*terra*. the country. By the grant of a rood of land, doth pafs ten  
pearches\* the fourth part of an acre. And by the grant of fix  
foot in length and two foot in breadth, fo much only doth pafs.  
And by thefe, and fuch like names, land may be granted.

By the grant of *Mineras* or *Fodinas plumbi*, &c. or mines of Co. Super  
*Mineras*. lead, &c. the land itfelf will pafs, if livery of feifin be made Lit. 6. Co.  
thereof; but otherwife it feems not, and then the grantee hath 5. 12.  
by the grant a power to dig only, granted unto him.

If one grant to me to dig a trench in his ground, from fuch a Perk. Sect.  
place to fuch a place, to convey water by a lead pipe, or other- 111.  
wife; hereby alfo *inclusive* is granted a liberty at any time after  
to dig to amend it as occafion fhall be.

If one grant to me to dig turfs in his land or foil, and to carry Co. Super  
them away at my will and pleasure; by this is not granted the land Lit. 4.  
itfelf, the houfes or trees thereupon, or mines therein.

If one grant to another, common for all his beafts in his Co. Super  
land; hereby is not granted common for goats, pigs, and fuch like Lit. 4. Perk.  
beafts and cattle that are not commonable. But if the grant be Sect. 108.  
of common for all manner of beafts, *contra*. And if one grant 109.  
to another, common without number in his land, the grantor is  
not hereby excluded to common there with the grantee.

And if one grant to me, common of pafure for ten kine in  
his lands in *Dale*; by this grant I fhall have common in his com-  
monable grounds and lands only, and not in any other lands.  
And if a man grant common of pafure to me, for my beafts *ubi-  
cunque averia fua ierint*, and he occupy 100 acres of land with  
his beafts, and after he keep no beafts; yet by this grant I may  
keep

Perk. Sect.  
116.

14 H. 8.

a Clar. c.

Trin. 5. J.

B. R.

b per. Wi.

liams &amp;

Yelverton

Justices.

Mic. 3. J.

Co. Super

Lit. 5. Ric.

&amp; Wife-

man's cafe

Mic. 9. J.

Co. Super

Lit. 4.

Fitz. Barr.

237.

Co. Super

Lit. 4. Dic.

285. Trin.

Jac. B. R.

accord'.

35 H. 6. 37

Co. Super

Lit. 118.

39 H. 6. 35

Dier 59.

Perk. Sect.

115.

(1) For t

he may ha

(2) See

keep my beast in those 100 acres. But if he grant to me common of pasture for my beasts wheresoever his cattle shall go, &c. by this grant I shall have no common but when the grantor doth use his common with his cattle, &c.

Perk. Sect. 116. By the grant of estovers, will pass, houseboote, hayboote, and Estovers. plowboote. But if a man grant to me estovers out of his manor, I may not by this grant cut down any of the fruit trees within his manor (1).

14 H. 8. 1. If land be granted to me; hereby also implicitly is a way there- Way.  
a Clar. case unto granted to me also. a So that if one have twenty acres of  
Tinn 5. Jac. land, and grant me one acre in the midst of it, hereby *inclusive*  
B. R. there is granted me a way to it. b And yet if a man have two  
per. Wil- closes, and he use to go over one of them for his ease, to the  
liams & other close, by a new way, and after he grant the further close  
Yelverton cum pertinentiis; by this grant the new way doth not pass.  
Justices.

Mic. 3. Jac. If a man have a forest, park, chase, vivary, or warren in his Forest,  
Co. super own ground, and he grant his forest, park, chase, vivary or war- Park, chase,  
Lit. c. Rice ren; hereby not only the privilege, but the land itself doth pass. warren.  
& Wife- But if the ground be anothers; or if it be his own, and he  
man's case. grant \* be only of the game, &c. in these cases, the land, or soil \* P. 97.  
Mic. 9. Jac. itself, will not pass.

Co. super If a man be seised of a river, and by his deed doth grant *sepa-* Fishing.  
Lit. 4. *ralem piscariam*, or *aquam suam* in the same, and maketh livery  
Fitz. Barre *secundum formam chartæ*; by this grant doth pass only a liberty to  
237. fish within the water, and not the soil, nor the water itself: and therefore the grantor may take water still; and if it be dry, he may take the soil also. And if one grant all his fish in his pond; by this is granted a power to come and fish for them; but the grantee may not hereby dig a trench and let out the water to take the fish, albeit they may not be otherwise taken (2).

Co. super If one be seised of twenty acres of land, and he grant to Vesture or  
Lit. 4. Dier another and his heirs the vesture, or the herbage of it, and maketh herbage of  
285. Trin. 5. livery of seisin in it *secundum formam chartæ*; by this grant do land.  
Jac B. R. pass the corn, grass, underwood, sweepage, and the like; and  
accord. for these things the grantee may have an action of trespass for any wrong done to him in them. But hereby the land itself, the houses, and great trees thereupon, and mines therein, do not pass. And if one grant the herbage, or vesture of a wood; hereby is granted the grass and underwood only, and not the timber of great trees. But if a man, so seised of twenty acres of land, grant to Profits of  
another the profits of this land, to have and to hold to him, and lands.  
his heirs, and maketh livery *secundum formam chartæ*; hereby the vesture, herbage, trees, mines, and all whatsoever parcels of that land, do pass.

35 H. 6. 37. If one grant to another all his deeds, or all his muniments; Deeds.  
hereby will pass all his charters, feoffments, leases, releases, con-  
firmations, letters of attorney, and the like.

Co. super If one give or grant to another *omnia bona*, or all his goods; Goods.  
Lit. 118. by this do pass all his moveable and immoveable, personal and real  
39 H. 6. 35. goods, as horses, and other beasts, plate, jewels, and household  
Dier 59. stuff, bowes, weapons, and such like; and his money, and his  
Perk. Sect. 115.

(1) For the nature and different kinds of estovers, see Co. Lit. 41. b. the same estovers that tenant for life may have, tenant for years shall have.

(2) See before, in page 86, note 3.



## Chattels.

## \* P. 98.

stock is a chose  
in action. 11th Jun 1798  
Hes. Jun 781  
1794  
Burr. 2579.

## Utenfils.

Grant of  
all a man's  
estate,  
right, &c.

## Note.

corn growing on the ground, also all the obligations and bills that are made to him, and in his own name, do pass by this, but not the debts due by such obligations and bills (1). And some say that leases and terms of years of houses, lands, rents, commons, &c. rents charge for years, wardship of tenants in capite, and by knights service, and the interests that a man hath by statute staple, statute merchant, or elegit, do pass by this grant; but of this, others doubt (2). And if a man give or grant to another *omnia catalla sua*, or all his chattles; hereby doth pass as much as by the grant of all his goods, and by this without question leases for years, &c. do pass. But by neither of the grants do pass those goods or chattles which the grantor hath by delivery, in keeping for another, or the like. Neither doth any estate of inheritance or freehold, or the charters concerning any freehold pass under these words, *Neither doth any thing in action, as debts or the like, nor hawks, hounds, poppinjays, or the like, pass by this grant.* <sup>b</sup> And yet if an executor grant *omnia bona & catalla sua*; hereby the goods and chattels he hath as executor, as well as his other goods and chattels, will pass. And if one grant all his leases for years which he hath by any conveyances; hereby the leases for years which he hath as executor, as well as other leases for years, will pass.

If one grant to another all his utensils; hereby will pass all his household stuff, but not his plate, jewels, or any such like things.

If a man be seised of land in fee simple, or for life, and have an estate in it for years, by statute merchant, staple, elegit, or the like; and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant, all his estate, and as much as he is able to grant, doth pass. And if tenant for life of land, the remainder to the stranger in tail, the remainder to the right heirs of the tenant for life, do grant by these words; hereby both his estates do pass. And if a tenant in tail grant all his estate in the land; hereby there doth pass as much as he can grant. And all these words also do carry and pass reversions, as well as possessions. And if a man have a term of years of land, and he grant his term; hereby doth pass the term of years, and all his estate and interest of the land.

And note, that by all these names these things may be granted; Fitz. Brief. and that for such things as are grantable without deed, when they pass by a verbal grant in any of these words, the words shall have the same exposition as they have in deeds.

(1) If a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax to another, who may cancel and use the same at his pleasure, *Co. Lit.* 232. b. Money due on bond, is a *chose in action*, so called, because, though the property in a debt vests at the time of forfeiture mentioned in the obligation, yet there is no possession till recovered by a course of law. A *chose in action* strictly is not assignable at law. *Co. Lit.* 214. 266. a. And after an assignment of a bond, if an action is brought on it, it must be brought in the name of the obligee; and by this reason, the power of attorney, and covenant that the assignor (the obligee) will not release, in case an action is brought, are inserted in the assignment of the bond. But tho' a *chose in action* cannot be assigned to a common person, yet it may to the King, 1 *Pr. Wms.* 252. The King may by his prerogative assign a *chose in action* to A. and it will be a good assignment; but if A. assigns it over to any other person, that assignment will be void, *Cro. Jac.* 180. A Court of Equity however will protect an assignment of a *chose in action*. 3 *Pr. Wms.* 200.

(2) Leases for years do not pass by a grant of *Omnia bona*; but otherwise in a will, the civil law being the guide; by two judges against one, *Cro. Eliz.* 386. *Portman v. Willis*.

12 H. 8. 4.  
Bro. Grant.  
96. 51. Dene  
39. 47. Dier  
5. Co. 8. 33

a Per ch.  
Just. B. R.  
21 Jac.  
b Adjudged  
3 Jac. Kely.  
64. to. Co.  
4. 1.  
Per. Flem-  
ming Just.  
7 Jac. B. R.  
Dier 59.

Co. super  
Lit. 345.  
Lit. Sect.  
613. Plow.  
161. Co. R.  
153.

Bro. Dene  
10.

Plow. 171  
140. Co. 10  
106.

Bro. Grant  
64.

Adjudg. M  
10 Jac. B. R.  
Burton v.  
Brown.

Bro. Grant  
33 88. Dene  
16.

Co. 1. 46.

Bro. Grant.

Dockraies  
12 Jac.

12 Jac. Br.

(1) But if t  
law 63. accord  
until forcibly

H. 6. If one grant all his goods in such a place *si quæ fuerint*; by this grant nothing doth pass but the goods that are in such a place at the time of the grant, and not any other goods that shall be there afterwards.

Bro. Done 10. If two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all their goods they have in common, and likewise all the goods they have in severally.

Plow. 171. If two tenants in common, or others severally seised of land, 140. Co. 10. joyn in the grant of a rent of twenty shillings, or a horse, out of 106. the land whereof they are so seised; by this grant the grantee shall have two twenty shillings, or two horses (1).

Bro. Grant. 64. If a man grant a rent of ten pound to me, to have and to hold during my life and my wife's life, and after the death of my wife, a rent of three pound to me for my life; in this case, if my wife die, I shall have both the rents. But if there be any words of restraint or determination of the first rent, it may be otherwise.

Adj. M. \* If one be seised of a garden plot in the parish of Sale, and P. 99. to Jac. B. R. grant it to B. for ten years, which being expired, he doth grant his garden plot to C. for twenty one years, and C. doth build a house upon part of it, and leaveth the other part in a garden plot still, and after the twenty one years ended, the lessor doth grant to D. *totam illam pecum fundi siue gardin' plott' nuper in tenura de B. & nunc de C. lying in the parish of Sale*, by this grant, the house newly built, and the plot of garden doth pass.

Bro. Grant 33 88. Done 16. If one grant his manor of Dale, in Dale, which in truth doth extend into Dale and Sale; in this case no part of the manor that doth lye in Sale shall pass. So if one grant all his tenements in Dale; hereby none of the tenements in Sale will pass. So if the manor lie within the parishes of A. B. and C. and the grant is of the manor of Dale, lying within the parishes of A. and B; by this grant no part of the manor lying in C. will pass. But if one seised of the manors of A. and B. in the county of C. grant thus, *totum illud Manerium de A. & B cum pertin' in com' C.* or *totum illud Manerium de A. cum B. in com' C.* by these grants, in case of a common person, both the manors will pass.

Bro. Grant. If one grant all his lands in Dale, which he had of the gift of I. S.; by this grant nothing will pass but that which he had of the gift of I. S. But if one grant all his lands in Dale, called Hodges, which he had of the gift of I. S. by this grant all that which is called Hodges shall pass, albeit the grantor had it not of the gift of I. S.

Dockraies 14. If one grant all his lands in the occupation of I. S.; by this grant doth pass not only such lands as I. S. doth occupy by right, but also such lands as he doth occupy by wrong, and not only the lands whereof he hath some estate, but also such lands as whereof he hath the pasturage only.

Jac. Br. If one grant all his lands in B. and elsewhere in the county of S. in the tenure of I. S. by this grant nothing doth pass but that which is in the tenure of I. S.

(1) But if they reserve twenty shillings upon a lease, they shall have only one twenty shillings. *Finch's* law 63. according to the maxim of law, that every mans grant shall be taken, by construction of law, must forcibly against himself, *Co. Lit.* 183. a.

If one grant his manor of *S. nec non omnes marifcos fuos de S. ac omnia terra, tenementa, &c. in S. & alibi dict' Maner' Spehan'* by this grant the marsh doth pass, though it be no part of the manor.

Adjudged  
Seignior  
Went-  
worth's case  
Co. 1. 46.

for they are part  
of the demesne lands  
which the Lord is  
wised in his demesne  
as office.

If one grant all his demesne lands of his manor of *Dale, &c.* it seems by this the customary land parcel of the manor, held by copy, doth pass.

If one be seised of tythes which did belong to an abby, part of which were gathered by the almoner, and part not, and he grant *omnes & omnimodas decimas granorum, &c. infra dominium prædicti & precinæ ejusdem, in dioc. Comit. ac omnes alias decimas, proficua & commoditates &c. infra dominium prædicti & dioc. Monasterii &c. spectan. & quæ nuper per Eleemoxinar. ejusdem Monasterii collectæ fuer.*; by this grant shall pass, all the tythes, as well those that were \* collected by the almoner, as those which were not, and those words *quæ per Eleemoxinar.*, &c. shall refer only to the last, and not to both sentences.

Adjudged  
H. H. 2 Jac.  
B. R. Ba-  
ker's sale.

\* P. 100.

If one grant all his lands in D. containing ten acres, whereas in Dier 80. truth his lands there do contain twenty acres; by this grant the whole twenty acres will pass.

**Dier 80.**

If one grant the scite of an abbey, *Et omnia terras prae' pasturas Et subscript' cum pertinen' diu' Monaster' pertinen' &c. viz.* such a thing, and such a thing &c. by this grant, the grantee shall have all the lands belonging to the monastery, and viz. shall relate to *Subscript'* only, and not to *omnia*. See more in grant *infra* *numb. 4.* and in testament, at *numb. 8.* and in fine, at *numb. 3.*

**Dier 70.**

**In the ex-  
ception, and  
how that  
shall be  
taken.  
1. In the  
the thing  
excepted.**

The exception is always taken most in favour of the feoffee, lessee, &c. and against the feoffor, lessor. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them, and he, or the vendee, may cut them, and take them away. And by such an exception, the lessor will have the boughs, fruit, herons, and hawks, that breed in them, &c.

Co. 10, 106,  
14 H. 8. 1.  
11. 52.

If a man be seized of a fishing from such a place to such a place, and hath a mill upon the water, and he grant *totam partem suam piscariæ de D. quatenus terræ suæ se extendunt, salvo tamen stagno molendini*: this exception doth not take away the fishing of the grantee in the mill pond, but it shall have relation only to the pool to repair the mill.

Perk. Sec.  
646. Fitz.  
Affs. 316.

Have it a house  
that piscaria  
lapped the soil. But  
the excavation is not  
of the same kind  
with the thing granted

If a man seized of a manor make a lease of it, excepting all the saleable underwoods, now growing, or which hereafter shall grow on the premises, which have been usually sold by the owners of the manor, with free entrie, egress, and regress, for the selling, making, and carrying away of the same, at times convenient; in this case the soil is not excepted by reason of the subsequent words.

Hil. 16 Jac.  
B R per  
Judges.

If one be seised of a manor, and make a lease of it *cum pertinenti*, *una cum columbari ac redditu tenentium, decimis garbarum, finibus, heriot persequitur* Cur' & aliis omnibus proficiis, *Advocat' Ecclesia* & *worce' except'*, in this, the exception doth begin at *Advocat' Ecclesia*, and doth except that also which followeth, and no more.

Dier 58.

**If**



If one grant lands in fee, excepting the trees, or any other thing, to the grantor, without saying (and to his heirs;) by this exception, the thing excepted is severed only for the life of the grantor, and then it shall pass with the rest of the things granted. But if the thing be excepted indefinitely, without saying (for the life of the grantor, &c.) nor how long, this shall be taken to be an exception during the estate.

\* The *Habendum*, as all other parts of a deed, for the most part, shall be taken most strongly against the grantor, and most in advantage of the grantee; yet so as withal it shall be construed as near the intent of the parties as may be, as in all the cases following doth appear.

If land be given, or granted, to one, *habendum*, or to have and to hold, to him and his heirs, so long as he pay 20*l.* yearly to I. S. and his heirs, or so long as such a tree doth stand, or like; this is a kind of fee simple, but it is limited and qualified, and determinable upon this contingent. And yet this may become a pure fee simple, for if land be granted to one and his heirs, until I. S. pay 100*l.* and I. S. dye before he pay it, in this case the estate is become a pure fee simple.

If lands be given or granted to a man, to have and to hold to him and his heirs, this is a fee simple, pure, absolute, and perpetual; and this is made by these words [his heirs]; for it is a general rule that these words [his heirs] only, make an estate in fee simple in all feoffments and grants. But this rule hath many exceptions: for if feoffment of land be made to I. S. & *heredibus*, without the word [*suis*] this is a fee simple: and yet, if the grant be to I. S. and I. D. & *heredibus*, without this word [*suis*] *contra*, for this is only an estate for their lives. And if lands be given to a Bishop, Parson, or the like, to have and to hold to him and his successors; this is a fee simple. And if lands be given to a Mayor and communality, or other corporation aggregate, generally without the word successors, or any other word, or if lands be given to such a corporation for their lives, this is a fee simple. But if land be given to a Parson, or the like, to have and to hold to him, without saying how long; or to have and to hold for life; by this he hath no more but an estate for life (1). \* And if lands be given to the King generally, without any other words; this is a fee simple. <sup>b</sup> So if one grant *Deo & ecclesie de D.*; it is said this is a fee simple in the Parson of D. So also of a grant *Ecclesie de D. per Thirne Iust.* So if a grant had been to the Monks of such a house, it had been a fee simple in the house. And in like manner it is in other cases: <sup>c</sup> as if one recite, that B. hath enfeoffed him of white acre, to have and to hold to him and his heirs, and then he saith further, that as fully as B. hath given white acre to him and his heirs, he doth grant the same to C. by this C. the grantee hath the fee simple of this acre. And if one grant two acres to A. and B. to have and to hold the one to A. and his heirs, and the other to B. *in forma predicta*; by this B. hath a fee simple in this other acre; for an estate in fee simple, fee tail, or for life, may be made by such words of

(1) See accordingly this distinction between a corporation aggregate, and a corporation sole, in respect of the estate they respectively take, by a grant in which the word successors is omitted, clearly explained, *C. Lit.* 94. b.

*Join a will  
Robertson & Gray  
99th 1*

\* P. 102.

*Co. Litt. 169. b.  
47. a.  
12. b.*

*38. P. 1. 3*

reference. Also if a rent be granted between parceners for to make an equality of partition, and it be granted generally, and without any words of heirs, yet this is a fee simple (1). So where lands are given in *Frankalmoine* (2). And so \* also it is in the cases of a release of right, a fine, and a recovery.

If one give or grant land to another, to have and to hold to him and his heirs males, or to him and his heirs females; in both these cases, there is a fee simple made; but otherwise it is when these words are in a will, for then it is but an estate in tail only (3).

*Quasi if parceners  
convey to a stranger  
receiving a joint estate  
they take it jointly  
in severalty. —  
semble severally*

If one grant land to one, to have and to hold to him and his right heirs; by this he hath a fee simple. And so it shall be taken if it be by fine. So if one grant land to *I. S.* for life, the remainder to the heirs, or to the right heirs of *I. S.* this is a fee simple; so if one make a feoffment in fee to the use of himself for life, and after his death to the use of his heirs; this is a fee simple.

If one grant land to *I. S.* to have and to hold to him, and the heirs of *I. S.*; this is a fee simple, and all one with a grant to *I. S.* and his heirs.

If one grant land to another, to have and to hold to him for twenty years, and that after the twenty years, the grantee shall have it to him and his heirs by 10*l.* rent, and give livery of seisin: by this the grantee shall have the fee simple.

If one grant land to the wife of *I. S.* to have and to hold to her for life, and after to *I. S.* in tail, and after to the right heirs of *I. S.* by this *I. S.* hath a fee simple.\* And if one grant land to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.*; by this *A.* hath a fee simple. \* expectant on the tail.

If land be granted to a man and his wife, to have and to hold to them, and the heirs issuing of them, ~~in fee~~ this is a ~~fee simple~~ fee tail, and not a fee simple. See *Bousfield's Case*.

If land be granted to one and his heirs, by the premises of a deed, to have and to hold to him for life; by this he hath a fee simple. So if by the premises of a deed, land be granted to one and the heirs of his body, to have and to hold to him and his heirs; by this he hath an estate tail, and a fee simple expectant. And so *vice versa*.\* If by the premises of the deed, the grant be to him and his heirs of his body: by this also he hath an estate tail, and a fee simple expectant (4).

Fee tail.

If lands be given or granted to a man, to have and to hold to him, and to the [or his] heirs of his body, or the [or his] heirs males of his body, or the [or his] heirs females of his body; by this the grantee hath an estate tail. So if lands be given to a man, to have and to hold to him and the heirs males, or to him

(1) Because the grantor hath a fee simple, in consideration whereof he granted the rent; *ipse tenet liges capient ut jure regantur*, Co. Lit. 10. a. Plow. 134. b.

(2) For the doctrine of *Frankalmoine*, see Co. Lit. 93. b. The statute of 12 Car. 2. c. 24. does not the least vary the tenure in *Frankalmoine*, but expressly saves it.

(3) For the operation of words in a will, as to what estate passes by them, whether in fee, in tail, or life, see fully in the chapter on testaments.

(4) But according to 8 Co. 154. b. the words *heirs of the body*, in the *habendum*, qualify the word *land* in the premises, and create an estate tail, without any fee expectant. See also Mo. 26. — *contra* Co. Juc. 2. 6. and 2 Roll. Rep. 23. See more apply, as to what words make an estate in fee simple, in *Abb. Estate (R.) (L.) Com. Dig. Estates (A. 2.) Bar. Abr. Estate in fee simple (B.)*.

Lit. ider  
Co. 1. 1  
Co. super  
Lit. 20.  
7. 41.

Co. super  
Lit. 21. Co.  
7. 41. 5 H.  
5, 6.

Co. super  
Lit. 26.  
Plow. 135.

(1) It is a  
to inherit mu  
and nature of  
cessary to cre  
of fines and r  
(2) And on  
of issue extinc  
(3) The da  
marriage. T  
special tail; b  
estate for life.  
the cause of t  
lieth in tenure  
thly. The do  
as to the doct  
(4) The w  
purchase. 2 A  
(5) Nor doe  
cause the word  
will and inten

and the heirs females of his body begotten : in both these cases it is an estate tail (1).

Lit. idem.

Co. 1. 140.

Co. super

Lit. 20. Co.

7. 41.

If lands be given to a man and his wife, to have and to hold to them and the heirs males, or to them and the heirs females, of their two bodies begotten : by this they both have an estate tail.

And if lands be given to them, and the heirs males, or heirs females, of the body of the husband begotten on the wife : by this he hath an estate tail, and \* his wife an estate for life only. And

\* P. 103:

if lands be given to *A.* to have and to hold to him and his heirs on the body of *B.* begotten ; by this *A.* hath an estate tail, and *B.* hath nothing (2). So if lands be given to a man and his wife, to have and to hold unto them, and the heirs which he shall beget on her body ; by this they have an estate tail in them both. If

lands be given to a man and his wife, and the heirs of the body of the husband ; by this the husband hath an estate in general tail, and the wife but an estate for life. If lands be given to him,

to have and to hold to him, and his heirs he shall beget on the body of his wife ; by this he hath an estate tail, and she no estate at all.

Lit. Sect. 17.

If one give his land to his daughter, or cousin, in frank-marriage ; by this they have each of them an estate tail without any word of [heirs, or heirs of body,] &c. (3).

Co. super

Lit. 21. Co.

7. 41. 5 H.

5. 6.

If one give lands to *B.* and his heirs, to have and to hold to *B.* and his heirs, if *B.* have heirs of his body, and if he die without heirs of his body, that it shall revert to the donor ; by this *B.* hath an estate tail. So if one give lands to *B.* and his heirs, if he have issue of his body ; by this he hath an estate tail (4).

So if lands be given to *B.* to have and to hold to him and his heirs, provided that if he die without heir of his body, the land shall revert. So if lands be given to *A. & B. uxori ejus, & hered' eorum, & aliis hered' ipsius A. si dict' hered' de dict' A. & B. exeunt' obierunt sine herede de se, &c.* by this they have an estate tail. And so in all such like cases, where after a limitation of a fee simple, these, or such like words are added, *viz.* that if he die without heirs of his body the land shall revert ; for in all these cases the *habendum* is construed to be a limitation, or declaration, what heirs are meant before (5).

If lands be given to *A.* and *B.* (a young man and maid unmarried) to have and to hold to them, and the heirs of their two

Co. super

Lit. 26.

Plow. 135.

body of theirs, to have and to hold to them, and the heirs of their two

*Devise to wife and issue by her husband : no issue after 9 months, then in tail an hys. if extinct*

*Platt v Postle  
2 M & S. 65  
11 Nov. 7*

*never construed as a condition that may be construed a condition*

*dy v King 2 King. 447. contra but not law*

(1) It is a constant rule, that in the creation of an estate in tail, it must appear of what body the persons to inherit must issue, and it is the essence of the estate. 1 *Pr Wms.* 72. *Co. Lit.* 27. b. For the origin and nature of estates tail, what things may be entailed, the different species of estates tail, the words necessary to create them, the incidents and inconveniences attending them, and the introduction and progress of fines and recoveries in order to bar them, see 2 *Bl. Com.* 110. *Co. Lit.* 9, 19 and *Wright's Ten.* 186.

(2) And on the death of *B.* without issue, in the lifetime of *A.* *A.* becomes tenant in tail after possibility of issue extinct ; for the nature of this estate and its privileges, see *Co. Lit.* 27. b.

(3) The daughter or cousin takes only an estate in special tail. This gift may be either before, or after, marriage. The words in *frankmarriage*, according to the rules of law, create an estate of inheritance in special tail ; but these four requisites must be incident to the gift, or else those words will create but an estate for life. 1st. It must be given for consideration of marriage. 2dly. The woman or man, that is the cause of the gift, must be of the blood of the donor. 3dly. If the gift be made of such a thing as lieth in tenure, the donees must hold of the donor at the time of the estate in frank-marriage made. 4thly. The donees shall hold freely of the donor, till the fourth degree be past *Co. Lit.* 21. b. See further as to the doctrine of frank-marriage in *Fleta. lib. 3. cap. 11. Com. Dig. Estates (B. 6).*

(4) The word *issue* in a will, may be a word of limitation ; but in a deed, it is always a word of purchase. 2 *Atk.* 582.

(5) Nor does such construction, or explanation of the *Habendum*, retract the gift in the premises, because the word *heirs* has still its operation, and by such construction becomes more conformable to the will and intention of the donor. See *Bac. Abr. Estates in tail (B).*



bodies; by this each of them hath an estate tail, and if they marry their heirs may inherit it

If lands be given to the son, to have and to hold to him, and his heirs of the body of his father; by this the son hath a fee-simple. But if the words be, to have and to hold to him and the heirs of the body of the father engendred; by this it is an estate tail in a deed, as it is in a will. And if the father be dead, the law is so also; but it seems the son shall have by this only an estate for life, except he be issue in tail to his father *per formam doni*. So if there be grandfather, father, and son, and the father dieth, and lands be given to the son, to have and to hold to him, and the heirs of the body of the grandfather; this is an estate tail in the son: but neither the father, nor the grandfather, have either of them any estate in these cases. If lands be given to *I. S.* and the heirs of the body of his wife (being dead) begotten; by this *I. S.* hath an estate tail.\*

Will.

\* P. 104.

\* If one grant lands to *I. S.* to have and to hold to him, and the heirs of his body issuing, the remainder to *I. D.* and his heirs *in forma predicta*; by this *I. S.* and *I. D.* after him, have each of them an estate tail (1).

If one grant lands to *A.* to have and to hold to him for life, the remainder to the first son of *A.* and the heirs males of the body of that first son; by this, the first son hath an estate in tail, and *A.* his father but an estate for life only. But if lands be granted to *A.* for life, the remainder to the heirs of the body of *A.*; by this *A.* hath an estate tail in him. And if lands be given to a man and his wife, to have and to hold to them, and one heir of their bodies lawfully begotten, and to one heir of the body of that heir; by this there is an estate tail made, yet so as it shall last only during the lives of those two heirs.

If one grant lands to another, to have and to hold to him and to his heirs of the body of such a woman lawfully begotten; by this he hath an estate tail for begotten shall be intended by the donee on that woman.

If there be husband and wife, and they have issue a son and daughter, and lands are given to the wife, to have and to hold to her, and the heirs of her late husband on her body begotten; by this the wife hath an estate for life, and the son an estate in tail, and if he die without issue, it shall go to his daughter, *per formam doni*.

If lands be granted to the husband of *A.* and wife of *B.* to have and to hold to them, and the heirs of their two bodies; by this they have each of them an estate in tail in them; for there is a possibility that one husband and wife may die, and then the other husband and wife may intermarry.

If there be father and son, and lands are given to the father, to have and to hold to him, and the heirs of the body of his son; by this the son hath an estate tail, but the father, as it seems, but an estate for life.

If lands be given to the mother for life, the remainder to her son and the heirs of the body of his father on her begotten, (the father being dead) by this the son hath an estate tail.

If lands be granted to *I. S.* to have and to hold to him, and the heirs he shall happen to have of his wife; by this he hath

Co. super  
Lit. 7. Co.  
8. 87.  
Aff. pl. 47.  
5 Aff. 14.

Co. super  
Lit. 20.

Co. super  
Lit. 26.

Co. super  
Lit. 26.

Co. super  
Lit. 20.

Co. super  
Lit. 26.

Co. i. 140.

Co. super  
Lit. 26.

Co. super  
Lit. 20.

Co. super  
Lit. 26.

Co. super  
Lit. 146.

Lit. sect.

83, 285.

Co. 8. 85.

6, 2, 24.

Finche's

law 60.

Co. super

Lit. 9.

Dier 307.

Co. 7. 23.

12 H. 4. 3.  
Dier 274.

Lit. Sect.  
352.

12 H. 4.

(1) It is pre-  
sented above  
with Mandeville  
ext above  
(2) Because  
there one nam  
(3) See furth  
er. Estate in  
(4) If the gra  
nted, and of  
ant generally,  
at is the gre  
date, the grant

(1) If the remainder had been to *J. D.* *in forma predicta*, without the word *heirs* being inserted, this limitation would vest a good estate tail in *J. D.* Co. Lit. 20. b.

but an estate tail, and no fee simple, and his wife hath no estate at all.

Co. super  
Lit. 20.

If lands be granted to *I. S.* and the heirs that the said *I. S.* shall lawfully beget of his first wife, and he hath no wife at the time of the grant; by this he hath an estate tail.

Co. super  
Lit. 26.

If *A.* have issue by *B.* his wife, *C.* a son, and *D.* a daughter, and *A.* die, and lands are granted to *B.* *to have and to hold to her* and to the heirs of *A.* her late husband on her body begotten (1); in this case and by this deed *C.* hath an estate tail, and the woman hath only \* an estate for life, and if *C.* die without issue, \* P. 105. *D.* his sister shall have the land *per formam doni.* But if one grant lands to *A.* late wife of *I. S.* to have and to hold to the said *A.* and the heirs of *I. S.* on the body of the said *A.* begotten; in this case the son and heir shall take no estate by the grant (2). And the same construction shall be upon the same words in his will. *Will.*

Co. super  
Lit. 26.

If lands be granted to the husband and wife, to have and to hold to them, and the heirs of the body of the survivor of them; by this the survivor shall have an estate tail after the death of the other.

Co. super  
Lit. 20.

If lands be granted to *I. S.* to have and to hold to him *& heredibus de carne sua*, or *heredibus de se*, or *heredibus quos sibi contigerit*, in all these cases *I. S.* hath an estate tail and no more.

Co. super  
Lit. 28.

If lands be granted to husband and wife, to have and to hold to them, and the heirs of the body of the husband, the remainder to the husband and wife, and the heirs of their two bodies begotten, this remainder is void, and therefore by this the husband hath an estate in tail, and the wife a joint estate for life with her husband, and no more.

Co. 1. 140.

If lands be granted to *I. S.* and his heirs of the body of *Iane a Noke* begotten; by this *I. S.* hath an estate tail, and no more.

Co. super  
Lit. 20.

If lands be granted to *I. S.* *& heredibus de corpore procreatis*; by this the heirs that shall be begotten afterwards shall take. And if lands be granted to *I. S.* *& heredibus de corpore procreandis*; by this the heirs of his body before begotten shall take *per formam doni* as well as those that shall be begotten afterwards.

Co. super  
Lit. 146.

If one grant to *I. S.* that if he and the heirs of his body be not yearly paid 40*l.* that he or they shall distrain in the lands of the grantor; by this the grantee hath an estate in tail in the rent: and if he grant to *I. S.* that if he and his heirs be not paid, &c. that he or they shall, &c. he hath a fee simple in the rent (3).

Lit. sect.

83, 285.

Co. 8. 85.

6, 2, 24.

Finche's  
law 60.

Co. super  
Lit. 9.

Dier 307.

Co. 7. 23.

If one give or grant land to another, to have and to hold to him for life; or to him and his assigns, and say not how long, nor for what time; and the grantor make livery of seisin according to the deed; by this the grantee hath an estate for his own life (4). But if no livery of seisin be made, no estate at all, but an estate

*See v. Wharton*  
19 R. 630  
*Bevis to A for*  
*life with to the*  
*right heirs of B*  
*and his wife*  
*and his wife*  
*child or other*  
*heir of both in f*

(1) It is presumed the words printed in *Italicks* in this case, should be omitted, to make it consistent with *Mandeville's* case put by *Ld. Coke*, in 1 *Inst.* 26. b. and to distinguish it from the next case in the text above.

(2) Because he was named after the *Habendum*, *Co. Lit.* 26. b. See note 4. thereto, in the 13th edition, where one named after the *Habendum* shall take.

(3) See further what words make an estate tail, *Com. Dig.* Estates (B. 3) *Vin. Abr.* Estate, (R.) *Bac.* Estate in tail (B)

(4) If the grantor hath authority to make such a grant; an estate for a man's own life being more beneficial, and of a higher nature, than for any other life, *Co. Lit.* 42. but if tenant in tail makes such a grant generally, with livery, the grantee shall have the land but during the life of the tenant in tail, for that is the greatest estate he can lawfully make; but if the king grants lands; or rent, and limits no estate, the grantee does not take any estate of freehold. *Roll. Abr.* Estate (O).

at will, doth pass by this deed. And if he that doth grant the land, be but a lessee for years of the land, and he make no livery of seisin upon the grant; by this his term of years, and that estate which he hath, is granted. But if he make livery of seisin upon the grant, then an estate for the life of the grantee will pass, and it is a forfeiture of the estate of lessee for years, of which he in reversion may take present advantage. And if one grant to another, common in his land when he doth put in his own beasts, or estovers in his manor when he cometh there, and say no more, by this it seems the grantee hath an estate for life.

\* If one grant land to *I. S.* to have and to hold to him, or his heirs, in the disjunctive; this is but an estate for life, and no more. So if one grant lands to *I. S.* to have and to hold to him, and his heir, in the singular number; by this *I. S.* hath only an estate for life, and no fee simple.

If one bargain and sell land to another for money, and limit no time, and express no estate; by this the bargainee shall have only an estate for life. But otherwise it was before the statute of uses, for then it had been a fee simple.

If lands be granted to *I. S.* for life, and after to the next heir male of *I. S.* and the heirs males of the body of such next heir male; by this *I. S.* hath but an estate for life. But if it be to the next heirs males of *I. S.* it is an entail.

If one grant land to *I. S.* to have and to hold to him in fee simple, or in fee tail, without saying [to him and his heirs, or to him and his heirs males, or the like] this is but an estate for life, and no more. So if one grant land to *I. S.* to have and to hold to him and his seed, or to him and his issues generally, without more words; by this is made only an estate for life. But in the construction of a will the law is otherwise, in most of these cases (1).

If lands be granted to two & *heredibus* without this word [*Suis*] by this they have an estate for their lives and no longer.

If one grant lands to *I. S.* to have and to hold to him and his heirs for his own life, or for the life of *I. D.*; by this *I. S.* hath an estate for life and no more.

If one grant lands to *A.* and *B.* *Habendum sibi & suis* omitting all other words; or to have and to hold to them and their assigns; by this they have an estate for life only. So if lands be granted to any natural person, to have and to hold to him and his successors; by this he hath only an estate for his life.

If one grant his lands to *I. S.* to pay his debts, to have and to hold to him generally, without limiting any estate; in this case *I. S.* hath an estate for life only.

If lands be granted to *A.* and *B.* to have and to hold to them for their lives, to the use of *C.* for his life; by this *C.* hath an estate for his life if *A.* and *B.* live so long.

If a tenant in tail grant *totum statum suum*; by this the grantee hath an estate for the life of the grantor, and no longer. And if a lessee for life grant all his estate; hereby his estate for life doth pass; for this is as much as he can lawfully grant.

(1) See post in the chapter on testaments.—Difference of construction does not only arise on different instruments: for in the very same case, and in the very same court, the same limitation has received two different constructions, when applied to a legal, and to a trust estate. See *Fearne on cont.* rem. 3d. edition 96. This note is bad. He has in view *Bagshaw v. Spencer*. No act makes

*See v. Brown & Asher 165*

Forfeiture.

*Lease at certain rent with clause of non-enjoyment while the rent is paid, without being*

*Forfeiture is within an estate for life and so void for want of livery or a bargain for years to year, and the tenant may avoid the standing estate after a month's notice.*

*This is a misstatement of Justice's case and see 1 Co. 640*

*Co. Rep. § 40*

*Grant to a man of sanguine pro hereditabili quæ sita de Will. copyhold*

*2 East 515*

*B & Al 127*

*Devis to A and her heirs during her line gives a fee.*

*2 Salk. 619*

Co. super Lit. 42. 234. 235.

Co. 5. 112. super Lit. 8.

Co. 1. 87. 130. Plow. 539.

Co. 1. 66.

20 H. 6. 33.

Co. super Lit. 8. 20.

20 H. 8. 35.

Co. 5. 112. 1. 140.

Co. 4. 29. super Lit. 1. 8.

Co. 8. 96.

Dier 186. Lit. Sect. 613.

Co. 1. 53. super Lit.

345. Plow. 562.

162. Co. super Lit. 24.

Co. super Lit. 183. 4. Plow. 161. F.N.B. 16.

Co. super Lit. 147. Co. 8. 85.

Co. 5. 9. 113.

† 38 Eliz. B. R. in the case of Ros & Adwick.

(1) For t



If a man have a son and a daughter; and die, and lands be granted to the daughter and the heirs females of the body of the father; it seems by this she hath only an estate for life.

*For she must be heir general as well as heir female.*

Co. super  
Lit. 42.  
234. 235.

If one grant land to another, to have and to hold to her while she shall live sole, or during her widowhood, or so long as she shall \* behave herself well, or so long as she shall dwell in such a house, or so long as she pay 10*l*. yearly, or so long as the coverture between her and her husband shall continue; or if one grant lands to a man, to have and to hold unto him until he shall be promoted to a benefice, or the like: in all these cases, if livery of seisin be made according to the deed, or if the grant be of such a thing whereof no livery is requisite, the grantee hath an estate for his life, and no more, and that determinable also.

\* P. 107.

Co. super  
Lit. 183. 42.  
Plow. 161.  
F.N.B. 168.

If one grant lands to *I. S.* to have and to hold to him for life, and doth not say for whose life; this regularly shall be taken for the life of *I. S.* the lessee, and not for the life of the lessor. But if the lessor himself have but an estate for life in the lands granted, then the lease shall be construed to be, and to endure during that life only, by which the lessor did hold, to prevent a forfeiture. And if he that doth make the lease, be tenant in tail of the land, this shall be taken to be a lease for the life of the lessor. And if a tenant for life of land, make a lease for years of it, and then grant his reversion by the name of a reversion, to another, to have and to hold to him and his heirs; by this he hath only an estate for the life of the grantor, and no more. So if tenant in tail of land, grant it to one for years, and after grant his reversion to another, to have and to hold to him, and his heirs; this shall be construed to be an estate for the life of the tenant in tail, and no longer, and the attornment of the tenants in these cases will not alter the cases. And so it is in case of a release also; as if tenant in tail doth release to *B.* (being lessee for years of the land) all his right to the land, this shall be taken to enure but for the life of the tenant in tail and no longer: as if a man retain a servant, and say not how long; this shall be taken for a year (1), *Constructio legis non facit injuriam*.

*This is not so the grantee takes a fee subject to be divested by the issue*

Co. super  
Lit. 147.  
Co. 8. 85.

If one grant to *I. S.* that if he be not paid yearly for his life 40*s.* he shall distrain in the land of the grantor for it; by this *I. S.* hath an estate for life in the rent. And if a man by his deed grant a rent of 10*l.* issuing out of all his land, quarterly, at the usual feasts, this is an estate for life of the grantee.

Co. 5. 9. 11.  
3.

If one grant lands to *I. S.* and *I. D.* to have and to hold to them during their lives, omitting these words [and the longest liver of them] by this notwithstanding they shall hold it during the life of the longest liver of them. And if lands be granted to *A.* to have and to hold to him during the lives of *B. C.* and *D.* without any more words; by this *A.* hath an estate during all their lives, and during the life of the longest liver of them. † And if lands be granted to *A.* to have and to hold to him during his life, and during the lives of *B.* and *C.* by this he hath a lease for his own life, and the lives of *B.* and *C.* and the longest liver of them.

† 38 Eliz.  
B. R. in the  
case of Ros  
& Adwick.

(1) For that retainer is according to law. See 13th. edition, *Co. Lit.* 42. b.

But

But if a lease be made to *I. S.* of land, to have and to hold to  
 \* P. 108. him during the time \* that *A.* and *B.* shall be justices of peace,  
 or during the time that *A.* and *B.* shall be of the *Inner Temple*, or  
 the like; in these cases the failer of one doth determine the estate.  
 \* And if a lease be made to *B.* only, to have and to hold to him  
 and *C.* for their lives; by this *B.* hath an estate for his own life  
 only, and no more, and *C.* hath nothing at all (1). And here by  
 Occupant. the way let it be observed, in these and such like cases, where  
 lands are granted to one man, to have and to hold to him (or to  
 him and his assigns, or to him, his executors, administrators and  
 assigns,) during the life, or during the lives of others; and in most  
 cases where a man is tenant *pur auter vie*, i. e. for the life, or  
 lives, of another, or others, if the tenant *pur auter vie* in posses-  
 sion die, his estate shall not go to his heirs, executors or admini-  
 strators, unless they can first get into possession after his death,  
 but he that can first get into the possession of the land after the  
 death of the tenant *pur auter vie*, shall have it for his life, and  
 after his death, then he that can first get into the possession again,  
 &c. And therefore if the land were let by the tenant *pur auter*  
*vie* at the time of his death to any undertenant for years, or for  
 one year, or at will, and this undertenant be in possession at the  
 time of the death of the tenant *pur auter vie*, this undertenant  
 shall have it for his life, if the life or lives by which it is held so  
 long live, for the rule in this case is *occupanti conceditur. Et*  
*capiat qui capere potest*. And this estate is called an occupancy,  
 and he that hath it an occupant (2). To prevent which mischief,  
 the lessee must take care when he takes his lease, to have it made  
 to him and his heirs during the life or lives of him or them by  
 whom it is held, for in this case after his death his heir and none  
 other shall have it; or if this be neglected, then he must take care  
 to grant over his estate by act executed (for by his last will he may  
 not devise it) to some friend and his heirs in trust for him; or he  
 may grant it over to another, and take a regrant of it to himself  
 and his heirs; or he may make a lease for years of the lands to  
 some friends in trust, and by this means he may have the fruit of  
 it during the term (3).

For years.  
 When such  
 a lease shall  
 begin, and  
 how long it  
 shall contin-  
 nue.

When no time is set down for the beginning of an estate, Co. super  
 then it shall begin presently; otherwise it shall begin at the Lit. 46.  
 time expressed, if it may stand with law. If a lease for years be Co. 51. 2. 5  
 made, bearing date the 26th day of May, to have and to hold Der 286.  
 for twenty-one years from the date, or from the day of the 307.

(1) See further as to what words make an estate for life, in *Vin. Abr. Estate (N. a.) Bac. Abr. Estate for Life (A.)*.

(2) If he who claims to be occupant does not take actual possession, he shall not be occupant, 1 Sid.  
 347. *Vaugh* 188.

(3) By the statute 29 Car. 2. c. 3. Tenant *pur auter vie*, may devise his estate by will attested by  
 three witnesses, and if he does not devise the estate, it is chargeable in the hands of the heir if it shall  
 come to him by reason of a special occupancy, as assets by descent; in case there be no special occupancy  
 thereof, it shall go to the grantees executors or administrators, and shall be assets in their hands. See  
 2 Salk. 464. 2 Vern. 719. And by the stat. 14 Geo. 2. c. 20. the surplus of the estates *pur auter vie*  
 in case of intestacy, is made distributable as personal estate. These two statutes have abolished the title  
 of general or common occupancy; but special occupancy by the heir at law, where the original grant is  
 to a man and his heirs during the life of *cestuique vie*, still continues. See further as to the general occu-  
 pancy, and of what things it may be, 2 Bl. Com. 8, 258, and 400. The notes to the 13th  
 Edition, Co. Lit. 41. b. Com. Dig. Estates (F). 2 Ld. Raym. 1000. 6 Mod. 66. Bac. Abr. Estate for  
 life (B.) *Vin. Abr. Occupant.*—and Estate (R. a. 3.) *Eq. Co. Abr. Estate (B.)* 1 Aik. 524 3 Aik. 708.

*As to the limit of estate pur auter vie in settlement see Francis*  
*Conting. Remain 233 385 386 & Co. L.H. 13 Ed. 20 a n. 5 R. v. Lantworth Case*  
*7 Ves. Jan. 1815*

\* Adjudged  
 B. R. 8 Ed.  
 Hobart &  
 Wiemore's  
 case.

Co. super  
 Lit. 41. 2. 5  
 388.  
 Plow. 556.  
 28. Dier. 301.  
 321, 264.  
 Co. 10. 94.

Co. 1. 154.  
 Plow. 198.

Co. 6. 36.

Dier 261.

Craddock's  
 case, 1 Aik. 7.  
 Jac. Co. B.

(1) In the  
 Lease for tw  
 session, and  
 decision; D  
 177. 1 Rol  
 on a preben  
 in B. R. Mic  
 Port and in  
 Time (A.) C  
 notes to Co. 1

date; in these cases the lease shall begin on the 27th day of May (1). But if the words be, to have and to hold from henceforth, or from the making hereof, in these cases the lease shall begin on the day in which it is delivered. And if it be to begin a *die consecutionis*, then it shall begin the next day after the delivery. And if it be, to have and to hold for twenty-one years, without mentioning when it shall begin, it shall begin from the \* delivery, if \* P. 109. there be no former lease in being; and if there be, then it shall begin from the time of the ending of that lease. If the deed have a date which is void, or impossible, as the 30th of February, or 40th of March, and the term be limited to begin from the date, then it shall begin from the delivery. So if a man by his deed recite a lease which is not, or which is void, or misrecite a lease that is in *esse* in point material, and then say, to have and to hold from the end of the former lease; this lease shall begin in course of time at the time of the delivery of the deed.

*But in the case of the King's grant the lease is void.*

Co. l. 154.  
Plow. 198.

If one make a lease of land to *A.* for twenty years, and then grant it to *B.* to have and to hold to him from the end of the first term, &c. in this case this second lease shall begin, as soon as the first lease, by what means soever, shall end. But if the words of the second lease be, to have and to hold to him from the end of the twenty years, in this case the second lease shall not begin until the twenty years be expired. And if one make a lease of white acre to *A.* for ten years, and of black acre to *B.* for twenty years, and then, reciting both the leases, doth make a lease to *C.* to begin after the former leases; this shall be taken respectively, and shall begin, for white acre after the end of the ten years, and for black acre after the end of twenty years. And if one make a lease to Two for sixty years, provided that if the lessees shall die within the term, that then presently after the decease of the last of them longest living, the lessor shall re-enter, and one of them die; and after the lessor doth make a lease to another, *Habendum &c. cum post five per mortem sursum reddi vel forisfacturam* of the last surviving lessee *acciderit vacare* for forty years; in this case, this second lease shall begin after the death of the lessee surviving re entry of the lessor, or the effluxion of time of the first lease, which of them shall first happen, and the lessee cannot at his election make it to begin at any other time.

*Ca. 211.*

Co. 6. 36.

Dier 261.

If a man make a lease for thirty years, and four years after make another lease to another man, in these words *Noveritis &c. me A. de B. prediis 30. Annis finitis dedisse & concessisse B. de C. &c. Habendum a die consecutionis presentium et termino predicto finito, usque ad finem 31. Annorum*: by this the second term shall begin at the end of the thirty years. And if one make a lease to *A.* for twenty years, and after make a lease to *B.* to have and to hold to him, from the end of the first term, for

Craddock's  
case, 1alc. 7.  
Jac. Co. B.

(1) In the case of *Fugh* and Duke of *Leeds*, solemnly determined in *B. R.* Michaelmas term 1777. Lease for twenty one years, made to commence from the day of the date, held to be a good lease in possession, and the same as if it had been to hold from the date; the following cases were mentioned in that decision; *Dyer* 218. *Moor* 4. 5 *Co. Clayton's case*. 5 *Co. Barwick's case*. *Flewelling's case*. 4 *Bullst.* 177. 1 *Roll. Rep.* 387. 3 *Bullst.* 204. *Co. Lit.* 46. b. 166. b. *Aleyne* 77. 6 *Wil. & M.* questions on a prebendal lease. 11 *Wm.* 3. *Sir Robert Hoare's case*. 2 *Ld. Raym.* 1141. — *Thompson & Vandike*, in *B. R.* Michaelmas, 1736. *cor. Ld. Hardwicke*. and the case of the Attorney General v. Countess of *Portland* in the Exchequer. *cor. Sir Thomas Parker*. See further on this point, *Vin. Abr.* Estate (Z. a.) Time (A.) *Com. Dig.* Estate (G. 8.) 1 *Wils. Rep.* pt. 2. p. 165. *Bac. Abr.* Leases (E.) rule 2. and notes to *Co. Lit.* 46. b.



twenty years, to be accounted from the date of the last deed ; in this case the second lease shall begin at the end of the first lease, and these words [to be accounted, &c.] shall be rejected.

If one make a lease of land to *A.* for ten years, and after by indenture grant it to *B.* to have and to hold to him, from Michaelmas next for ten years, and after the first lessee doth purchase the reversion, by which his term is drowned ; in this case, the second lease shall begin presently when Michaelmas is come.

• P. 110.

\* If two jointenants be, and one of them grant the land to *I. S.* to have and to hold to him for twenty years, if the lessor and his companion so long live ; by this the lease shall continue no longer than they both live together, and when either of them is dead the lease is determined. \* And if one grant his land to *I. S.* to have and to hold to him, his executors, &c. for the term of one hundred years, if *A. B.* and *C.* live so long, and leave out these words [or either of them] in this case, if either of them die, the lease is determined. But if the words be, to have and to hold for one hundred years if *A. B.* or *C.* [omitting or either of them] shall live so long, *contra.* <sup>b</sup> If a lease be made of land to the husband and wife, to have and to hold to them for twenty-one years, if the husband and wife, or any child between them shall so long live ; this is a good lease, and shall continue for all their lives, and for the life of the longest liver of them, albeit the first words be in the copulative.

If one possessed of land for a term of years, grant the same to another, to have and to hold to him, his executors and administrators, or to him and his assigns, or to him, without any more words ; or if a man that is possessed of a term grant his lease to another, and doth not say for what time ; it seems in these cases, the whole term is granted, albeit no livery of seisin be made. And in the first case if livery of seisin be made, then it seems there doth pass an estate for the life of the grantee, and therefore that this is a forfeiture of the estate of the lessee for years, whereof he in the reversion may take advantage presently. And if a lessee for years of land grant a rent out of the land generally, without any limitations, this shall be construed to enure for a grant of the rent so long as the estate of the grantor doth continue. But if he grant a rent by express words, for the life of the grantee : by this the grantee shall have it for all the term if he live so long.

If one grant lands to *I. S.* to have and to hold to him for life, reserving the first seven years a rose, and if he will hold the land over, that he shall pay a rent in money, and no livery of seisin is made ; by this it seems in certain is made a lease for seven years, untill the condition be performed ; and then also it seems it is a lease for no longer time. And so perhaps it will be, if livery of seisin be made.

If one grant a rent of 5*l.* per annum unto *I. S.* to have and to hold to him, &c. until he shall receive 20*l.* in this case he shall have a lease for four years of this rent. But if lands be granted to *I. S.* to have and to hold, &c. until he shall receive 20*l.* out of the profits of it ; in this case if livery of seisin be made, the grantee hath an estate determinable upon the levying of the money ; and if no livery be made, he hath no estate at all but the lease is at will. If the grantor be lessee for years *whether the whole term pass.* If

5 Schenck 173  
2 Selwyn 732  
5 Term Rep. 472  
2 B. & Cr. 100.

And if ~~the~~ he hold over he is tenant by sufferance. It will be accepted and then tenant at will and liable to the lord's action at will. If the grantor be lessee for years *whether the whole term pass.* If they be such as are applicable to an estate at will. It is however that an action of covenant cannot be brought at an action of assumpsit.

(1) See ante

chap. 5.

If one make a lease for life, and say that if the lessee within one \* year pay not 20s. that he shall have but a term for two years ; \* P. 111.  
by this if he doth not pay the money he hath only a lease for two years, albeit livery of seisin be made upon it.

*No livery be made he has but an estate for 2 years at all events*

If one make a lease to *I. S.* to have and to hold to him, his ex-  
ecutors &c. for ten years if *I. D.* shall live so long, and *I. D.* is  
dead at the time when the lease is made ; in this case *I. S.* hath an  
absolute lease for ten years.

If one grant lands to *I. S.* to have and to hold to him, his ex-  
ecutors, &c. for three years, and so from three years to three years  
during the life of *I. S.* or from three years to three years during  
the life of the lessee ; by this it seems *I. S.* hath a lease for six  
years and no more. And if one grant lands to *I. S.* to hold for  
three years, and after the end of those three years for three other  
years, and after the end of those three years for three other years,  
during the life of the lessor ; by this it seems *I. S.* hath a lease for  
nine years and no more.\* And yet if in these and such like cases,  
where a lease is made from so many years to so many, for the life  
of any person, livery of seisin be made upon this deed, *secundum*  
*formam chartæ* ; this perhaps may be an estate for life.

*See Danner v. Sherrin  
2 Bos. & Pull. 399 - 402  
Dover v. Dixon  
10 Ch. 15  
In the  
Godright v. Richardson  
19 Th. in 1st case  
however there are two  
great errors neither*

If lands be granted to have and to hold from Lady-day, *pro ter-*  
*mino unius Anni* & sic de uno Anno in unum Annum quamdiu am-  
*babus partibus placuerit* ; by this the grantee hath a lease for three  
years only in certain, and afterwards a lease at will. And if lands  
be granted to have and to hold from the Nativity of Christ next,  
*pro termino unius Anni*, & si in fine dicti unius Anni ambæ partes  
*placerent quod eadem presens dimissio foret renovata tunc habend'*  
*premissa* to the lessee, &c. *ab* & post dictum festum Nativitatis  
*Domini usque terminum trium Annorum extunc prox' sequen'* ; by  
this the grantee hath a lease in certain but for one year only, and  
if the parties agree again, a lease for three years.

*4 Inst. 32*

If one make a lease to *I. S.* to have and to hold to him for  
years, and say not how many years : by this the lessee hath a lease  
for two years and no more.

If one grant his land to *I. S.* to have and to hold to him until  
*I. D.* shall come to twenty-one years of age ; in this case if *I. D.*  
dye before that time the lease is ended.

If a man possessed of a term of years of land doth grant the land  
to another and his heirs, this by construction will amount to a good  
grant of his interest (1).

If lands be granted to husband and wife, and to *I. S.* to have  
and to hold to them, and to the heirs of the husband and *I. S.* ;  
by this the wife hath only an estate for life, in a moiety with her  
husband, and the husband and *I. S.* have the fee simple in joynt-  
tenancy, to them and their heirs.

If lands be granted to two brothers, or two sisters, or to a \* bro- \* P. 112. it is  
ther and sister, or to a father and son, or any others, to have  
and to hold to them, and the heirs of their bodies begotten :  
by this they have joynt estates for their lives, so that the sur-  
vivor of them will have the whole for his life, and several in-  
heritances, *i. e.* estates in general tail by moieties in common one

*Limitation of special tail  
of estates to 2 persons  
divers persons  
to two persons before  
whom marriage  
allowable.*

(1) See ante 89. note 1.

with

with another (1). And if land be granted to two men and their wives, and the heirs of their bodies begotten; in this case they have joynt estates for life, and afterwards the one husband and wife shall have the one moiety, and the other husband and wife the other moiety, in common (2). And if lands be granted to a man and two women, to have and to hold to them, and the heirs of their bodies; by this they have each of them an estate tail in common with the other (3).

If lands be granted to husband and wife, to have and to hold to them, and their heirs of their bodies issuing, or in any such like manner; by this the wife hath an estate tail, as far forth as the husband. But if it be granted to them, to have and to hold to them, and the heirs of the body of the husband, or to the husband and wife, and the heirs of the husband which he shall have by his wife, or in any such like manner; by this the wife hath only an estate for life, and the whole estate tail is in the husband. So *vice versa* if lands be granted to husband and wife, and the heirs of the wife upon her body begotten by the husband; by this he hath an estate for his life only, and his wife the whole estate tail. And if lands be granted to the husband, to have and to hold to him and the heirs of his body, on the body of his wife begotten; or to have and to hold to him, and the heirs of his body begotten on the wife he shall first marry; or to have and to hold to him, and his wife he shall first marry; and the heirs of their bodies begotten; in these cases the husbands have the whole estate, and the wives nothing at all. But otherwise it is it seems when the estate is limited by way of use to a man and his wife, that he shall afterwards marry, for by this it seems the wife shall take also.

If lands be granted to A. a married man, and to S. a married wife, and to the heirs of their bodies engendred; by this they have each of them an estate tail presently executed, and whiles the wife of the husband, and the husband of the wife live, they shall hold it for their lives, and if they happen to dye, and these to intermarry and have issues, their issues shall have it according to the intail.

If lands be granted to A. and B. to have and to hold to A. for life, the remainder to B. in fee: by this A. shall have the whole for his life, and B. the fee simple afterwards (4).

As touching this matter, these differences are to be taken; between things that are granted, and between the estates: when the things that are granted are such as lye in grant, and take effect by the delivery of the deed only, without any ceremony, or take effect by the same ceremony; and when not, but another ceremony is required to the perfection of the grant and estate: and when there is an expresse estate made by the deed in the premises thereof; and when but an implied estate only: as for examples, if one grant land, \* P. 113. rent, common, or any such like thing, to one and his heirs, by the

When the Habendum shall be said to be repugnant and void; and when not, but shall control, divide, or expound the premises.

(1) And if a gift be made to two men and the heirs of their two bodies, the remainder to them and their heirs; they are joint-tenants for life, tenants in common of the estate tail, and joint-tenants of the fee. Co. Lit. 183. b.

(2) Of the inheritance; and no cross remainder or other possibility shall be allowed by law, where it is once settled and takes effect. Co. Lit. 25. b.

(3) So if lands are given to two men and one woman, and the heirs of their three bodies begotten, they have several inheritances. Co. Lit. 184. a.

(4) See further in Bac. Abr. Joint-tenants (D). Com. Dig. Estates (K. 1.) Vin. Abr. Joint-tenants (P.)

*If two be tenants in common of the freehold and then the reversion be granted to them and their heirs they will be tenants in common of the inheritance Co. Litt. 249. b. But not if the freehold estate be an estate tail Co. Litt. 184. because the estate tail exists independent of the fee and is not merged in it as a life estate would be.*

Lit. Sec. 27, 28, 29. Co. super Lit. 26. Dier 340. Co. 1. 100.

15 H. 7. 10.

Dier 126.

Co. 2. 13. 8. 56. Perk. Sec. 181. 14 H. 8. 14. Co. super Lit. 183.

172. 530.

See before



premises of the deed, to have and to hold to him for life, or to have and to hold to him and to his assigns, without more words; in this case the *Habendum* is repugnant and void, and by this the grantee shall have an estate in fee simple, if livery of seisin and attornment as the case doth require be duly made, for otherwise no estate at all, but at will, will pass. So if a man grant a rent, or any such like thing that lieth in grant, to one and his heirs, to have and to hold to him for years; this is a void *Habendum*, and the grantee shall have the fee simple. But if a man grant land to another and his heirs, to have and to hold to him for a certain number of years; in this case, whether he make livery of seisin or not, it is a good *Habendum*; and by this the grantee shall have an estate for so many years, and no more.\* So if one grant land, rent, common, or any such like thing, to one in the premises of the deed, without limitation of estate, (which in judgment of law is an implied estate for life) to have and to hold to him for a certain number of years, or at will; this *Habendum* is good, and shall stand with the premises, and qualify it; and by this the grantee shall have but a lease for years, or at will, as the *Habendum* is.

consent  
Carter v. Madgwick  
Living.

& the livery comes  
too late he being  
already in possession of  
a term.

A bargain & sale  
to B & C & their heirs  
to the use of B & his  
heirs to make B a tenant  
to the premises held  
that as there was a  
term of years outstanding  
the bargain & sale had  
effect as a grant of the  
reversion of that term  
his enrolment came too late  
as B took a legal estate  
Haggeson v. Hamblin  
5 B & C. 101

this shows the law  
presumptive to be wrong  
in this case

And if one grant land by the premises of a deed to one and his heirs of his body, to have and to hold to him and his heirs; this *Habendum* shall stand, and this shall be taken an estate tail, and a fee simple expectant. So *vice versa*, if land be granted to one and his heirs, to have and to hold to him, and his heirs of his body; this shall be construed an estate tail, and a fee simple expectant, and so both shall stand together (1). *This is not so*

If lands be given to B. and his heirs, to have and to hold to B. and his heirs, and if he dye without heirs of his body, that it shall revert to the donor, it seems this is a fee tail only, and no fee simple expectant. *Voluntas donatoris in charta doni sui manifestè expressa observanda est.*

If a lease for years be made of land, and then the lessor by the premises of the deed, granteth the land to another, to have and to hold the reversion of the land to him, &c. for life; this *Habendum* shall stand. So if by the premises of the deed, the reversion be granted, to have and to hold the land itself, this is good and both shall stand together; but nothing is granted in either case but the reversion.

If the next advowson of a church be granted to three, to have and to hold to them, and either of them, jointly, and severally; this is joint and the *Habendum* is void. † And yet if one grant land to two by \* the premises of the deed, To have and to hold \* to one of them for life, the remainder to the other for life; this is not repugnant, but shall stand together, and make the estates several, and in remainder one after another. So if a lease be made to two, to have and to hold the one moiety to the one, and the other moiety to the other; by this they have several estates. *Expressum facit semper cessare tacitum.*

P. 114.

If a man have a lease for years of land, and he reciting this, by the premises of the deed doth grant all his estate in the land, to have and to hold the land or the term after his death, or for part of the time only; in this case the *Habendum* is void,

1. Jethold 34b  
In Doe v. Polymore  
1 M. Blackstone 53.  
this was overlooked

See before in page 98, note 4.

and

and the whole estate doth pass immediately by the premises (1).

If a tenant for life surrender a moiety of his land, and the lessor grant it all to a stranger, to have and to hold the one moiety for life, and the other moiety for forty years after the death of the tenant for life; this *Habendum* shall stand and enure according to the grant.

If a man seised of land in fee make a lease for life of it to one, and after grant the reversion of it to another, to have and to hold the reversion and the tenements aforesaid *cum post mortem, forisfacti, &c. vacare acciderit*; in this case the *Habendum* and premises may stand together (2). It is usual in the *Habendum* of a deed to set down to what use the party, to whom the deed is made, shall have the thing granted. But touching this, and the matters that do concern uses, see *use infra* at large. And see also more for the exposition of deeds in *Testaments numb. 8. Grant numb. 4. Leases cap. 14. numb. 4.* And here note, that parol agreements and conveyances have the same construction for the most part made upon them, as are made before upon deeds. And therefore if a man by word of mouth, without any writing, grant all his land in *Dale* to *I. S.* to have and to hold to him for life; but doth not say for whose life; this shall have the same construction as such a grant made in writing hath (3).

Note.

In the reservation of rent: and how that shall be taken.

This is always taken most in advantage of the feoffee, grantee, lessee, &c. and against the feoffor, grantor, lessor, &c. and yet so as the rent be paid during the time (4). And therefore if the reservation be only to the feoffor, grantor, &c. and the deed do not say also [to his heirs, executors, &c.] this reservation shall continue only for the life time of the grantor and shall determine with his death. And so also it is where the reservation is to the feoffor, or his heirs, in the disjunctive; for in this case the rent shall continue only during the life of the grantor (5). And yet if one make a lease for years rendring rent yearly during the said term, to the lessor or his heirs, or executors; this is a good reservation during all the term, by reason of these words [during the term] (6). So if the feoffor or lessor be \* seised in fee, and make a feoffment in fee, or lease for life or years, rendring rent to the feoffor or lessor, or his executors or assigns; in this case the rent shall continue only for the life of the lessor. But if the reservation be to the feoffor, or lessor, his heirs and assigns, in the copulative, or in the disjunctive to him, or his heirs, or to him and his successors (if it be the lease of a corporation) during the term; then all the assignees in the reversion shall enjoy it. And if the reservation be thus, yielding and paying so much rent (without any

(1) See accordingly, 1 *Salk.* 346. *Skins.* 528.

(2) See further, in what cases the *Habendum* shall be repugnant to the premises, *Vin. Abr.* *Grant* (K. a.) and the case of *Throckmorton v. Tracy*, *Plow.* 145.

(3) See accordingly 1 *Wood* 254. 5.—but see *stat. 29. Car. 2. c. 3.* and 2 *Bl. Com.* 297.

(4) By what words a reservation may be made. See *Com. Dig.* *Remainder* (B. 2.) *Vin. Abr.* *Reservation* (L.)

(5) And is void as to the heir, 1 *Vent.* 163. for the reservation being in the disjunctive, to the feoffor or his heirs, both cannot take it, and the word *heirs* cannot be a word of limitation, for if the heirs are to take at all, they must take originally, and if the rent vests in the feoffor, it cannot afterwards go to his heirs, for that would be contrary to the reservation.

(6) If the rent is made payable yearly, without saying during the term, the payment must be made during the term. *Moor* 459.

So held in the case of *Land, M.* *Car. B. R.*

7 H. 8. 19.

*Paf. 21 Jac.* *Hudon & B. R.* *Co. 10. 107.*

*Dier 130.*

*Co. 5. 111.* *Super Lit.* *10. 106.* *107.*

*Per. Will.* *ams & Welverton* *ult. contra,* *Jac. B. R.* *Co. 10. 106.*

*Co. super* *lit. 214.*

*Plow. 171.*

*Co. 10. 106.*

(1) See accordingly

(2) In respect of the point, *Gil*

more words,) this shall be taken for all the time of the estate, and shall go to him in reversion accordingly. And if the reservation be, rendring so much rent during the said term, and doth not say to whom; in this case it shall be construed to be to him that hath the reversion, and accordingly it shall be paid and shall continue during the term (1). <sup>a</sup> But if *A.* be seised of land in fee, and make a lease for years of it, rendering rent to *A.* [without saying to his heirs, &c.] during the said term; this rent shall continue only during the life of *A.* and no longer. And yet if *A.* be possessed of a term only, and make an under lease or assignment with such a reservation, *Quere.*

7 H. 8. 19. If the reservation be thus, yielding and paying 20s. during the said term, omitting the word [yearly] this shall be taken, to be not once only, but yearly during the term, and accordingly it must be paid. <sup>b</sup> And if a lease be made for years, rendring in every middle of the year, *quolibet medio Anni* 20l. this shall be paid during the term.

5. 111. 106. 107. If one by deed indented grant lands to *A.* to have and to hold to him for life, the remainder to *B.* and the heirs of his body, and for default of such issue, to remain to *D.* in tail, or for life, yielding therefore yearly, &c. in this case the reservation shall extend to all the estates.

130. If a lease be made the 10th. day of *August.* rendring rent at our Lady day and Michaelmas; in this case albeit our Lady day be first named, yet the first payment shall be at Michaelmas next after the making of the deed.

Per. Williams & Selveston 47. 48. If the reservation be at Michaelmas, or within twenty days after: in this case the 20th. day shall be taken exclusive. But if the rent be to be paid at Michaelmas or by the space of twenty days after, in this case the 20th. day shall be taken inclusive.

106. 107. If a lease be made in *December,* from the Nativity of Christ next for one year with this addition, *Et si in fine dicti Anni amba partes agreeant quod eadem dimisso foret renovata tunc habend' & tenend' premissa dicto 1. S.* (the lessee) *ab & post dictum festum tunc proxim. sequend. usque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dict. W. S.* &c. in this case, the reservation shall relate to both the terms; and the rent shall be paid the first year, although they do not agree to renew the lease.

10. super 214. \* If two jointenants by deed poll, or by word make a lease for \* P. 116.

life, reserving a rent to one of them; this shall go to them both (2). So if one of them be tenant for life, and the other in fee, and they join in a lease for life; or gift in tail reserving a rent; the rent shall enure to them both. But if tenant for life, and he in reversion, join in a lease for life, or gift in tail by deed reserving a rent, the rent shall enure to the tenant for life only, during his life, and after to him in reversion.

171. If two tenants in common make a lease of their land rendring 20s. rent; this shall be but one 20s. and not two 20s. So if the lease be rendring a hawke or a horse: by this they shall have but one hawke, or one horse, and not two hawkes or

(1) See accordingly, *Co. Lit.* 47. a. and further, *Vin. Abr.* Reservation (N).—by what words the rent reserved may be continued to those who become intitled after the death of the lessor, see *Gillb.* on Rents 63.

(2) In respect to the joint reversion; so a surrender to one of them shall enure to them both. *Co. Lit.* 44. a. but if the lease be by deed indented of them both, and the reservation to one of them only, it shall enure to him only, to whom it is made, *Lit.* § 346 see further for the reason, and authorities on this point, *Gillb.* on Rents 63. *Bac. Abr.* Rents (G.) *Vin. Abr.* tit. Reservation (E.)



two horses, as it shall be in cases where they do joyn in the grant of such things out of their land (1).

If one make a gift in tail of two acres of land, the one at the common law, and the other in burrow English, rendering an ox to him and his heirs, and the donee having two sons die, and the eldest son doth inherit the one acre, and the youngest son doth inherit the other; in this case the donor and his heirs shall have but one ox, &c.

If one make a lease of land for years if the lessee live so long, and after the lessor by his deed indented doth grant the land to another, to have and to hold the reversion to the grantee for his life *cum post mortem &c. aut aliter acciderit vacare reddend' inde Annuatim* to the grantor and his heirs *cum reversione predicta acciderit, 9s. 4d. per annum*; in this case this reservation of rent shall not begin before the reversion happen in possession.

If rent be reserved to be paid at two terms, and it is not said by equal portions; yet it shall be so taken, and it must be so paid (2).

In other respects.

Devise.

Remainder.

If one be possessed of a term of years of land, and grant it by deed to *I. S.* for his life, and after his death to *I. D.* in this case the whole term is granted to *I. S.* and his executors, administrators, and assigns shall have it and not *I. D.* But if a term were so devised by will, *contra*. And if one give or grant to another his horse, or his books for his life, and that after his death they shall remain to another, the remainder is void, and the first shall have it for ever, for the gift or grant of such a thing for an hour is the gift of it for ever (3).

See more in *use numb. 7. (4).*

And it is now time that we come to the other parts of a deed and first to a condition.

(1) See accordingly. *Bro. Abr. tit. Reservation pl. 44.*

(2) It is very truly observed, in the preface to *Ld. Ch. Baron Gilbert's Treatise on Rents*, that there is no part of the law more extensively useful, and interesting, than that of rents, and yet perhaps no part in which those niceties and distinctions, that are essential both to rights, and the means of recovering them, are less understood. Those who seek to obtain a clear knowledge of the doctrine of rent, and the practice respecting them, will find very considerable assistance in that excellent book, and in another small treatise of the same author on distresses and replevin. See also the statutes of 32 H. 8. c. 37. 2 W. & M. c. 5. 4 Ann. c. 16. § 10. 8 Ann. c. 14. 4 Geo. 2. c. 28. 11 Geo. 2. c. 19. 20 G. 2. c. 52. § 42. and further in *Co. Lit. 47.* and the notes thereto.

(3) But in a will, such a devise of a personality, with a remainder over, is good; whether it be by way of use, or not, see the case of *Hyde v. Parrat*, 1 Pr. Wms. 1.

(4) It may not be improper to subjoin some account of the several acts of parliament for registering deeds and wills.

The first statute in order of time is that of 2 & 3 Ann. c. 4. "For the publick registering of all deeds, conveyances, and wills, that shall be made of any honors, manors, lands, or hereditaments within the West-riding of the county of York after the 29th of September 1704," It enacts that a memorial of all deeds, and conveyances which shall be made after the 29th of September 1704, and of all wills and devises in writing, where the devisor or testator shall die after the said 29th of September, whereby any honors, manors, &c. in the said West-Riding may be any way affected in law or equity, may, at the election of the parties concerned, be registered in manner directed by that act, and that every deed or conveyance, that shall, after any memorial is so registered, be made of the honor, manor, &c. comprized in any such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as by the act is directed, before the registering of the memorial of the deed or conveyance, under which subsequent purchaser or mortgagee shall claim; and that every devise by will of the honors, &c. contained in any memorial so registered, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as by the act is directed. The act then establishes an office for the register;—directs the mode and time of his election by the freeholders, and of a successor on his death, forfeiture, or surrender of the office;—the mode and form of the memorial, the ceremonies to be observed thereon, and the fees to be paid for it; and inflicts penalties on the register in case of neglect. The act does not extend to any copyhold estates, nor to any lease at a rack rent, nor to any lease

as to the effect of the registering of a will after the 29th of September 1704, before a subsequent purchaser see *Hyde v. Parrat*. But upon this opinion.

not exceeding twenty-one years where the actual possession and occupation goeth along with the lease. It directs that memorials of wills registered within six months after the death of every respective testator, dying within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, or within three years after the death of every respective testator dying in parts beyond the seas, shall be as valid against subsequent purchasers, as if the same had been registered immediately after the testator's death.

The statute of 5 Ann. c. 18. is for inrolment of bargains and sales within the West Riding of the county of York, in the register-office there, and for making the said register more effectual.

The statute of 6 Ann. c. 35. establishes a register for the East Riding of the county of York, and for the town and county of Kingston upon Hull, for all deeds, and wills, of lands therein, which shall be made and executed after the 29th of September 1708, on the same plan, and under nearly the same regulations, as in the before mentioned act, and this act directs that all the clauses and provisions contained in it, which are not provided for or contained in the said acts of 2 & 3 Ann. c. 4. and 5 Ann. c. 18, shall extend to lands in the West Riding, as effectually as if they had been inserted in the said acts for establishing the register in the West Riding.

The statute 7 Ann. c. 20. establishes in like manner a register for the county of Middlesex after the 29th of September 1709, with an exception not only of copyhold estate, leases at a rack rent, and leases of the chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

The statute of 8 Geo. 2. c. 6. establishes in like manner a register for the North Riding of the county of York after the 29th day of September 1736.

These acts, except 5 Ann. c. 18. appear at length in 1 vol. Wood's Conv. p. 452 to 480.

For some general observations on the act of 7 Ann. c. 20. clear directions as to the mode of registering deeds and wills, and various precedents of memorials, see Rigg's Instructions for the registering of Deeds, &c. and Horsman's Prec. in Conv. 2 vol. 821.

Mr. Justice Blackstone in 2 vol. of his Commentary, p. 343, treating of these acts, says, "but however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties (where registers are established) by the inattention and omissions of parties, than prevented by the use of registers."

By these statutes there is not any time limited for registering deeds; it is therefore obvious from an inspection of the acts, how necessary it is, that deeds should be registered immediately on their being executed; to enforce this the more strongly, it may not be useless to consider, If a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee, or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee, or mortgagee, doth not thereby become in a worse situation, than he would have been by law, in case the registering act had not been made.

For the operation and construction of the registering acts, see the cases of *Cheval v. Nichols*: 1 Str. 44. *Honeycomb v. Waldron*, 2 Str. 1064. *Forbes v. Deniston*. 2 Brown's Parl. Ca. 425. *Hine v. Edd*, 2 Atk. 275. *Le Neve v. Le Neve*, 3 Atk. 646. and S. C. 1 Ves. 64.

## C H A P. VI.

## Of a Condition.

1 Condition.

*Quid.*

A Condition is a kind of law, or bridle, annexed to ones act, staying or suspending the same, and making it uncertain whether it shall take effect or no; or, as others define it, it is *modus*, a quality annexed by him that hath estate, interest, or right, to the land, &c. whereby an estate, &c. may either be created, defeated,

Limitation.

*Quid.*

or enlarged upon an incertain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue (1). And this sometimes is contained in a testament or will, and sometimes in a deed. And when it is in a deed it hath no proper place assigned it, but it may be in any part of the deed; howbeit for the most part it is placed next after the *Habendum*, or next after the reservation of the rent. It is also sometimes annexed to and depending upon estates; and sometimes annexed to and depending upon recognizances, statutes, obligations, contracts, and other things: conditions are also contained in acts of parliament and records. But of these we speak not here in the ensuing matters, which are especially to be applied to such conditions as are usually contained in deeds and annexed to the realty, *i. e.* to estates in fee-simple, fee-tail, for life, or years.

2. *Quæstiones.*

And of these conditions there are divers kinds. For some are in deed or exprefs, *i. e.* when the condition is exprefsed by the party in legal terms, and by exprefs words in writing, or without writing, knit to the estate; as if I enfeof a man of land, rendring rent at a day, on condition, that if it be not paid, it shall be lawfull for me to re-enter. And some are in law or implied, *i. e.* when the condition is *tacite* created by the law, without any words used by the party. The first sort of conditions also are some of them precedent, or executed, *i. e.* when the condition must be fulfilled are the estate can take effect; as where an agreement is between me and I. S. that if he pay me 10*l.* at Michaelmas, he shall have such a ground of mine for ten years; or where I make a lease of land to I. S. for ten years, provided that if he pay me 10*l.* at Michaelmas, he shall have the land to him and his heirs; and in these cases by the performance of the condition the estate is acquired (2). And some of them are subsequent, and executory, *i. e.* when the estate is executed, but the continuance thereof dependeth upon the breach or \* performance of the condition; as where a lease is made for years, on condition that the lessee shall pay 10*l.* to the lessor at Michaelmas, or else his lease shall be void; and in this case by the performance of the condition the estate is

This condition is subsequent for these words, *if he pay me 10*l.* at Michaelmas*, which words are not in the lease, but are added by the lessor, and therefore it is not a condition precedent, but a condition subsequent.

(1) For the distinction between a condition, and a limitation, see *Bac. Abr. Conditions* (H.) and therein in 1 *Atk.* 374, 383.

(2) Or if an estate be limited to A. upon his marriage with B. the marriage in a precedent condition and till that happens no estate vests in A. *Shower's Parl. Ca.* 83.—See further 1 *Pr. Wms.* 284 *Atk.* 18. 1 *Vesf. 4. S. C.* 1 *Wils. pt. 1. p.* 159. *Lamden v. Lamden* 2 *Bing.* 137.

(1) For the *Vern.* 83. 3 *Co. Abr. Cond.* (B.) *Fearne* o (2) If the co the disjunctive. (Y. b. 2.) (3) And to e secretly annexed. *Co. Lit.* heirs by a tacit *Co. Lit.* 13. b. implied be to a lim which shows

Co. super Lit. 201.

Lit. sect. 327.

Co. super Lit. 201. Plow. Colthirill's case. Co. B. 45.

Co. 4. 121.

21 H. 7. 24. Perk. Sect. 707. 708, &amp;c.



held and kept (1). These conditions also are some of them in the affirmative, *i. e.* that do consist of doing, as provided that the lessee shall pay the rent, or pay *10l.* to the lessor, &c. And some in the negative, *i. e.* that consist of not doing, as provided that the lessee shall not alien, &c. And some of them are in the affirmative, which imply a negative, as provided that if the rent be unpaid that the lessor shall re-enter, which implieth a negative, *viz.* not paid. Conditions also are some of them collateral, *i. e.* when the act to be done is a collateral act, as that the party shall pay *10l.* go to *Rome*, or the like. And some are inherent, *i. e.* such as are annexed to the rent reserved out of the land whereof the estate is made. And some of them also are restrictive and contain a restraint, as that the lessee shall not alien, or do waste, or the like. And some are compulsory, as that the lessee shall pay to the lessor *10l.* such a day, or his lease shall be void. And some of them be single, *i. e.* to do one thing only. And some copulative, *i. e.* to do divers things. And some disjunctive, *i. e.* when one thing of divers is required to be done (2). And some conditions make the estate whereunto they are annexed voidable only, by entry or claim. And some of them make the estate void, *ipso facto*, without entry or claim. And sometimes they tend to destroy estates, sometimes to make, or to enlarge estates, and sometimes neither to make nor destroy, but only to clogg estates, as where a lease is made rendering rent on a day, on condition if it be not paid that the lessor shall enter on the land and keep it till the rent be paid. And all these ways conditions may be lawfully made. *Inesse potest donatio- ni modus, conditio sine causa.*

The conditions in law, or implied, are either by common law, or by statute laws. The first sort, are some of them founded on skill, as where an office is granted, there is a condition *tacite* implied, that if the grantee doth not execute it faithfully according to the trust, the grantor may put him out. And some are without skill, as where an estate is made for life or years of land, there is this condition implied, that if the lessee do waste he shall forfeit the place wasted, or if the lessee make a feoffment of the land, he shall forfeit his estate, and the lessor shall enter. And where an estate is made in fee of land; this condition is implied, that the feoffee shall not alien it in mortmain (3). And these conditions do sometimes give a recovery, and no entry, as in the case of waste. And sometimes they give an entry and no recovery, as in the case of alienation in mortmain. In the case of exchange also there is a condition in law, for which see *exchange*.

\* It is a general rule, that when a man hath a thing he may condition with it as he will. Conditions in deed therefore may

3. What things may be made and done upon condition: and to what things a condition may be annexed; or not; and how it may be made and annexed thereunto.

\* P. 119.

(1) For the nature and doctrine of conditions precedent, and subsequent, see 2 *Fr. Wms.* 419, 626. *Vern.* 83. 3 *Chan. Ca.* 130. 3 *Lev.* 132. 1 *Wood* 273. *Ca. Temp. Talb.* 166. *Savinb.* 267. *Eq. Ca. Abr.* Conditions (B.) *Bac. Abr.* Conditions (1) *Vin. Abr.* Conditions (T.) *Com. Dig.* Conditions (B.) *Fearne* on conting. remain. 3 edit 313. 2 *Burr.* 899. 4 *Burr.* 1930. 1 *Wils.* pt. 1. p. 103, 136.

(2) If the condition be in the copulative, and it is not possible to be so performed, it shall be taken in the disjunctive. See fully as to conditions copulative and disjunctive, *Vin. Abr.* Conditions (S. b.) and *Y. b.* 2.

(3) And to every estate of tenant by the curtesy, in dower, for life, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee, &c. that he in the reversion or remainder may enter. *Co. Lit.* 233. b. also post.—And if by any accident a corporation is dissolved, the donor or his heirs by a tacit condition annexed by law shall have the land in reversion, and not the lord by escheat. *Co. Lit.* 13. b. It has been questioned whether this be a condition and not within an implied limitation of the reversion, but I 2 this cannot be for if the corporation be dissolved and the land alien to a stranger and then expire the estate of the stranger still remains which shews that it is a condition personal to the corporation as it were.

be annexed to things inheritable, to frank tenements, or to chattels real and personal: as for example, if a feoffment in fee, gift in tail, or lease for life, be made of lands or tenements, or a grant be of a rent, common, or the like thing, in fee-simple, fee-tail, or for life, these things may be done upon condition. So a lease for years of land, or a grant of a rent, &c. for years, may be made upon condition. And a lease may be made for five years on condition, that if the lessee pay to the lessor within the first two years ten marks then he shall have the fee, otherwise but for five years. Also a guardian in chivalry may grant the wardship of the body and land, or either of them, on condition. Tenants by statute merchant, staple, or elegit, may grant their estates upon condition. The lord may grant his feigniori to his tenant on condition. The tenant for life may grant his estate to his lessor, or him in reversion upon condition. The king may make letters patents of denization to an alien, or a charter of pardon to a man for his life, upon condition. Also releases and confirmations may be made upon condition. And a submission to an award may be upon a condition. But an institution to a benefice, or an induction, may not be on a condition. An attornment, or an express manumission of a villain cannot be upon a condition subsequent, as it may be upon a condition precedent. And a condition cannot be released upon a condition, as some hold. But the contrary is held by others clearly, and that there is no difference between this and a release of a right: *ideo quere* (1). An award cannot be made on a condition, as was held in *Sherers* case 35 *Eliz.* A contract or sale of a chattel personal, as an ox or the like, may be upon condition, as if *A.* sell his horse to *B.* that if *A.* do such an act, then *B.* shall pay 5*l.* at the day agreed upon, otherwise but 4*l.* So if I agree with a physician, that if he cure such a disease he shall have so much; and in this case he cannot have the money until he have done the cure. As where I promise a man 10*l.* when he hath built such a house, in this case he cannot have the money until the house be built. Also retaining of servants, delivery of charters, and divers other things may be done upon condition. And if an executor assent to a legacy upon a condition; the assent is good, but the condition is void.

And conditions annexed to estates in all the cases before, howsoever they are most frequently and safely made by deed in writing, yet it seems such conditions may be made and annexed to any estate of a thing grantable without deed, without any writing at all; howsoever in some cases it cannot be well pleaded, nor used without a deed; for it is a rule, that if a condition be pleaded \* in any action to defeat a freehold, the deed wherein the condition is contained must be shewed. But of chattels real, as leases for years, and the like, or grants of chattels personal, a man may plead that such leases and grants were made upon condition, without shewing the deed. And in the first case also of a condition to avoid a freehold, it may be given in evidence to a jury, and they may find the matter at large as it is, and so the party may have advantage of the condition without shewing any deed of it. Also the pleading

(1) A condition cannot be released, upon condition; for the condition annexed to the release shall be void, and the release shall be good. *Co. Lit.* 274. b. *Com. Dig.* Condition, (A. 8.)

Co. 8. 90.

of a feoffment in fee on condition, without deed and re-entry, is good if the party confesses the condition. A condition may be annexed to a limitation of uses, and thereby the same may be made void (1). See *use*.

Co. super  
Lit. 186.  
Perk. Sect.  
818. Lit.  
Sect. 358.  
Dier 6.

The nature of an express condition annexed to an estate in general is this; that it cannot be made by, nor reserved to, a stranger; but it must be made by, and reserved to, him that doth make the estate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident.

4. The nature of a condition in deed, and of a limitation.

Dier 298.  
Co. 8. 44.  
Perk. Sect.  
818, 819.

And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate, or charge, of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of an hundred men, yet is it subject to the condition still; and albeit some of them be persons privileged in divers cases, as the King, infants, and women covert, yet they also are bound by the condition (2). And a man that comes to the thing by wrong, as a disseisor of land whereof there is an estate upon condition in being, shall hold the same subject to the condition also. And when the condition is broken or performed, &c. the whole estate shall be defeated: so that if there be a lease for life made by deed and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pounds to the lessor; (if the lessee pay not this ten pounds, the estate in remainder is avoided also.) *Et sic e converso*, unless by special limitation it be otherwise provided; as if *A.* grant by indenture land to *B.* for life, the remainder to *C.* in fee, rendering rent to *A.* and his heirs, with condition that if the rent be behind, to re-enter and retain the land during the life of *B.* and no more, and *A.* doth enter in the life time of *B.* for non payment; this doth not destroy the remainder. And if tenant for life and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall re-enter; this \* is good without defeating the entire estate: for regularly a condition cannot avoid a part of an estate only, and leave another part entire; neither can the estate be void as to one person, and good as to another, (except it be in case of a condition annexed to an estate limited by way of use, as in *Frances case* Co. 8. 90.) And yet if *A.* make a gift in tail to *B.* the remainder to *B.* in fee upon condition not to alien, and *B.* doth alien; this doth defeat the estate tail only, and not the remainder. Also the whole estate of the whole, and not of some part only, shall be avoided; except by agreement the condition be specially restrained to some part, and the re-entry given in that part only; as where a feoffment is made

Dier 117.  
Co. 10. in  
Mary Portington's  
case. Super  
Lit. 230.  
Lit. Sect.  
374. Perk.  
Sect. 564.  
fo. 108. Lit.  
fo. 224. Dier  
127. Co. super  
Lit. 224.

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see *any*

*express for non*  
*is void, as it*  
*enables the lessee*  
*defeat the whole*  
*himself he created*

\* P. 121.

Co. 4. 121.  
Dier 127.

(1) And shall be executed by statute 27 H. 8. so that the donor and his heirs may take advantage of the condition *See* 77. See further in *Vin. Abr. Condition* (N.)

(2) And although regularly no laches shall be accounted in infants, or feme coverts, for non-entry, or non-claim to avoid descents; yet laches shall be accounted in them, for non-performance of a condition annexed to the state of the land. *Co. Lit. 246. b.*



of two acres, on condition that if such a thing happen, the feoffor shall enter into one of them. And further when he that hath right doth re-enter by force of such condition, he shall avoid all charges and incumbrances put upon the land after the condition made; for he that doth enter into land by force of such a condition, must have it again in the same plight as it was when he parted with it. And finally, a condition for the most part will not determine the estate without entry or claim. So that howsoever a limitation hath much affinity and agreement with a condition,<sup>a</sup> and therefore it is sometimes called a condition in law<sup>b</sup>, both of them do determine an estate in being before; and a limitation cannot make an estate to be void as to one person, and good as to another; as if a gift be made in tail to one and his heirs males, until he do such a thing, and then his estate to cease and go to another: yet herein they differ; 1. A stranger may take advantage of an estate determined by limitation, and so he cannot upon a condition. 2. A limitation doth always determine the estate without entry or claim, and so doth not a condition (1).

5. When an estate shall be conditional; and what words will make a condition, and what not; and how a condition may be known from a covenant, or limitation.

*Proviso.*

*Ita quod.*

*Sub conditione.*

*Si. Si contingat.*

\* P. 122.

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know therefore that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso*, *ita quod*, and *sub conditione*. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, provided that, or so as, or under this condition, that *B.* do pay to *A.* ten pound at Easter next; this is a good condition, and the estate is conditional without any more words. But there are other words, as *Si. si contingat*, and the like, that will make an estate conditional also, but then they must have other words \* joined with them, and added to them in the close of the condition, as that then the grantor shall re-enter, or that the estate shall be void, or the like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, and if, or but if it happen, the said *B.* do not pay to *A.* ten pound at Easter, without more words, this is no good condition; but if these or such like words be added, that then it shall be lawful for *A.* to re-enter, then it will be a good condition (2).

(1) For the distinction between a condition in deed, and a limitation, denominated by Littleton, a condition in law, see 2 Bl. Com. 155. Also the books, referred to in page 114, note 1. and further in Roll. Abr. Conditions (K.) Fearn on conting. rem 194, 196, 423. 1 Atk. 383. and the case of *Avelyn v. Ward*, 1 Vesf. 420.

(2) See more amply by what words a condition may be created, in *Bac. Abr. Conditions (A.)* and *Fin. Abr. Condition (C.) (D.) (H.)*.—If the reader considers the very great extent of the title *Condition* in *Finer's Abr.* (being almost an entire volume) and the numerous subdivisions thereof, he will not be surprised at the frequent references to that book. Mr. Hargrave, in his edit. of *Co. Lit.* 9. a. note 3. says, "He is the more frequent in his references to that abridgment, because it tends to facilitate the use of that immense body of law and equity; which, notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library." The advantages attending frequent references to the abridgments and digests, it is presumed, are too obvious to require to be pointed out: The reader thereby has before him in one view all the cases on the point, which are by far too numerous to be inserted in a note, even if they were all correspondent, and did not vary in their circumstances or decisions. But

Co. super  
Lit. 146.  
Co. 2. 70.  
Dier 152.  
311. Lit.  
Bro. 256.  
Dier 6. 22.  
Plow. 136.  
H. 7. 7.  
Perk. Sect.  
732.

<sup>a</sup> Lit. sect.

380.

<sup>b</sup> Co. 9. 118.

8. 17. 6. 41.

Plow. 413.

Co. 10. 40.

Dier 300.

Lit. Sect. 50.

Co. 2. Lord

Cromwell's

case. 10. Ma-

rry Posting-

ton's case.

Co. super

Lit. 204.

27 H. 8. 16.

Lit. Sect.

328, 329,

330, 331.

Dier 318.

17 H. 8. 15.  
Bro. Condi-  
tion 7.

(1) See a  
Bac. Abr. C.

Co. super  
Lit. 146.  
Co. 2. 70.  
Dier 152.  
311. Lit.  
Bro. 256.  
Dier 6. 222.  
Plow. 136.  
5 H. 7. 7.  
Perk. Sect.  
732.

But here note that these words *proviso*, *ita quod*, and *sub conditione*, albeit they be the most proper words to make conditions, yet do they not always make the estate by the deed to be conditional, but sometimes do serve for other purposes; for the word *proviso* hath divers operations besides; for sometimes it doth serve for and work a qualification, or limitation, and sometimes it doth serve to make and work a covenant only (1). And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional, when there are these things in the case: 1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself: 2. When it is compulsory to the feoffee, donee, &c. 3. When it comes on the part, and by the words of the feoffor, donor, lessor, &c. 4. When it is applied to the estate, and not to some other matter; as if one grant a manor with an advowson appendant, and after the *Habendum* and reservation of rent, amongst the covenants, there is this clause inserted [provided that the grantee shall regrant the advowson for the life of the grantor] this is a good condition. And thus it may be also a condition, and a covenant: as if the words run thus, provided always, and the feoffee, &c. doth covenant, &c. that neither he nor his heirs shall do such an act, this is both a condition, and a covenant. But if the clause have dependence on another clause of the deed, or be the words of the feoffee, &c. to compel the feoffor to do something, then is it not a condition but a covenant only; as if there be in the deed, a covenant that the lessee shall skowre the ditches, and then these words follow [provided that the lessor shall carry away the earth:] or if there is a covenant that the lessee shall repair the houses, and then these words follow [provided that the lessor do provide timber.] So if this clause be applied to some other thing, and not to the thing granted, then is it no condition, as if a lease of land be made rendring rent at B. provided that if such a thing happen, it shall be paid at C; this doth not make the estate conditional. Or a lease is made for years without impeachment of waste, *proviso quod non prosterneat domus voluntarie*; in this case, howsoever this doth make the privilege, yet doth it not make the estate conditional. Or a lease is made for years rendring rent, \* provided that the lessor, shall not dit- \* P. 123. train for the rent; in this case this is a good condition, but not annexed to the estate. So if in a deed of bargain and sale of land, after the *Habendum*, there are these words, *viz.* upon these conditions following, *viz.* that if the vendor pay the vendee twenty pounds at Easter, and enfeof him of a meadow called S. before Whitsontide, that the bargain shall be void. Provided nevertheless that the bargainer shall hold the land for twenty years without the let of the bargainee; it seems this Provided, in this case, doth not make a condition. So if a lease be made of a house, and amongst the covenants these words are inserted, [provided also that if the lessor will dwell upon it, or keep it in his hands, then the lessee, his executors and assigns, doth covenant upon one year's warning to remove and give place to the lessor, this lease notwithstanding;]

(1) See accordingly *Ca. Lit.* 203. b. *Mo.* 307, 707. What shall be a condition, and not a covenant. *See. Abr.* Condition (G). *Nelf. Abr.* Condition (B.)

it seems this is no condition but a covenant only. \* If a lease be made provided that if the rent be behind, without any more words; this is no good condition.

The word *si* also doth not always make a condition, for sometimes it makes a limitation; as when a lease is made for years if *I. S.* shall live so long.

There are other words also that in the King's grant, in last wills and testaments, and other special cases do make conditions, as *ea intentione, ad effectum, propositum, intentionem*, paying, and the like. So that if one devise his land to *I. S. ea intentione, &c.* that he shall pay to *W. S.* ten pound, or paying, or so as he pay to *W. S.* ten pound, or to sell, &c. these are good conditions (1). But these words regularly do not make a condition when they are used in deeds. And therefore if one make a feoffment in fee *ea intentione, ad effectum, &c.* that the feoffee shall do, or not do, such an act; these words do not make the estate conditional, but it is absolute notwithstanding. And yet perhaps these words being conjoined with some others may make a condition; as if lands be granted *ea intentione quod si defecerit, &c. tunc quod reintrabit*, or the like (2).

Also conditions are sometimes made, especially in estates and leases for years, without any of these formal words, when the apparent intent of the lessor is to make the estate conditional; albeit the words be not used as the words of the lessor, but as the words of the lessee, or indefinitely of neither. And therefore it hath been said, That if an indenture be made between *A.* and *B.* thus: it is agreed and covenanted between the parties aforesaid, that *B.* shall have the land for years, and that he shall not alien it; that this estate is conditional: But it seems this is not law. (3). But if this clause be inserted amongst other covenants, *viz.* If the lessee hinder the lessor to sell, cut, and carry away the trees upon the lands devised, that the lessor may re-enter and the lease shall be void; this is a good condition, and so it hath been adjudged in the case of \* *Haward and Fulcher, Hil. 3. Car' B. R.* And if a lessee for years do covenant in his lease, that if he, his executors, or assigns, shall alien, that it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant only (4). And if a lease for years be made, and this clause is inserted in the deed, it is agreed between the parties, that if the lessee do not pay ten pounds to the lessor at Easter, from thenceforth that lease shall be void; this is a good condition. And if a lease be made with this clause inserted in the deed, it is agreed that whosoever shall have the estate or interest, that he or they shall find sureties within the year for the rent, otherwise the estate shall cease; it seems this is a good condition. And

\* P. 124.

as to an advice  
being bound by the  
said advice. See  
Dier v. Harrison  
2 H. 4. 22.  
And as to an act  
of a lessee, see  
Dier v. Galliard, 11  
Dier v. Broom, 11 H. 4.  
And as to a condition  
in a lease, see  
Dier v. Broom, 11 H. 4.  
And as to a condition  
in a lease, see  
Dier v. Broom, 11 H. 4.  
And as to a condition  
in a lease, see  
Dier v. Broom, 11 H. 4.

(1) *A.* devised lands to *B.* paying 40*l.* to *C.* it is a good condition; for *C.* has no other remedy, and it will ought to be expounded according to the intent of the deviser, *Vin. Abr. Condition (1) pl. 9.*

(2) A condition may be annexed to a devise, as well as to any other conveyance. *Roll. Abr. Condition (L.)* See further by what words a condition may be created in a will, *Bac. Abr. Condition (B.)* and *Com. Dig. Devise (N. 9.)*

(3) If lease be made to a man and his assigns for twenty one years, provided that he shall not assign, the proviso being repugnant to the premises is void; but it would have been good, if the word *assigns* had been omitted. *Moor 881, cited in Bac. Abr. Grants (I.)*

(4) And the lessor may take it as a covenant or condition, but not as both. *Dals. 8. Bac. Abr. Condition (G.)*

Dier 66. 65.  
Curia Mich.  
3738, Eliz.  
B. R.  
Dier 79. 27.  
Co. super  
Lit. 204.  
Plow. 132.

Co. super  
Lit. 204.  
Doct. & St.  
94. Dier 65.  
38.

Dier 348.

Co. super  
Lit. 204.

Co. super  
Lit. 204.  
Co. 10. 42.  
How. 141.  
Ed. 4. 19.  
Ed. 4. 2.  
Dier 6.

(1) Words of  
to remain over  
ended as a limi  
(2) Regularly  
the consideration  
the thing granted  
condition, but n  
then the annuit  
works by con  
J. H. 41.



Dier 66. 65. if a lease for years be made with this clause inserted, and that it shall not be lawful for the lessee to alien without licence of the lessor, under pain of forfeiture; this is a good condition. And if a lease for years be made of a house, with this clause inserted in the deed, and the lessee shall continually dwell in the same house upon pain of forfeiture of the said term; this is a good condition. And if in a lease for years the lessee covenant to pay so much rent, and then these words are inserted, And if it shall happen, that the said yearly rent, &c. then the lessee doth covenant and grant, &c. that the lease shall be void; it seems this is a good condition, and so hath it been ever taken; as was said by *Just. Dodridge, Hil. 3. Car.* And in all these cases the estate is conditional. But in cases of feoffments in fee, gifts in tail, and leases for life, it seems that words penned in this manner will not make conditions, but that in these cases the precise and formal words of a condition are requisite (1). And therefore if a feoffment be made by deed, and therein is inserted this clause, that it is agreed, or that the feoffee doth covenant, that if the feoffor do such an act, the feoffor shall re-enter; this is no condition, nor the estate hereby made conditional. And yet see *Perk. Sect. 744.*

If one make a lease for years on condition to pay rent at four feasts, and after there is a clause in the deed, and if the rent shall be behind, &c. that he shall distrain; this clause doth not take away the condition, but the same doth continue, and the estate is conditional still. See more in the next question.

In the making of estates the cause is regarded. And in case of the grant of lands or tenements, *causa* doth sometimes make a condition, as if a woman give lands to a man and his heirs, *causa matrimonii prælocuti*; in this case, if she either marry not the man, or the man refuse to marry her, she shall have the land again to her and her heirs. But on the other side, if a man give land to a woman and to her heirs *causa matrimonii prælocuti*, though he marry her, or the woman refuse, he shall not have the lands again to him and his heirs. And in the case of a grant executory the word [*pro*] may make a \* condition. And therefore if a man grant me an annuity *pro una acra terræ*, or *pro decimis*, &c. or if he grant me an annuity for a way, or a gutter through my ground, this is conditional, and if he be disturbed in the way, acre of land, tithes, or gutter, he may refuse to pay the annuity. So if an annuity be granted to an officer for the executing of his office; or *pro consilio impendendo*, if the grantee do not execute the office, or give counsel, &c. the annuity shall cease (2). But if one grant me tithes, or an annuity, and I grant an annuity for these tithes, or grant to give counsel for the annuity; it seems the grants that are in this manner are not conditional, but absolute. So if I *pro consilio* &c. or *pro una acra terræ*, &c. make a feoffment

(1) Words of *an express condition*, shall not ordinarily be construed as a *limitation*; but where an estate is to remain over for breach of a condition, which is by express words a *condition*, yet it ought to be intended as a *limitation*, per Holt 11 Mod. 61. Page and Hayward. 2 Salk. 570. S. C.

(2) Regularly the word *pro* does not import a condition; but when the thing granted is executory, and the consideration of the grant is a service, or some such thing for which there is no remedy, but stopping the thing granted; as in the case of an annuity granted *pro consilio*, &c. the word *pro* has the force of a condition, but not of a condition precedent, and therefore the performance thereof need not be averred when the annuity is demanded; but in the case of a personal contract, as, if I tell you my horse for 10l. works by condition precedent, and you shall not take my horse, except you pay me 10l. per Hebart J. Hob. 41.

## Testament.

in fee, or lease for life of another acre, these estates are not conditional. And if one devise land to be sold by his executors, and to be distributed for his soul; by this it seems the estate or power of the executors is conditional. So if one devise his land to find a preacher or a chaplain. But otherwise it seems it is of land so conveyed by deed in a man's life time. And if a feoffment be made of land *ad erudiendum filium*; some have said this estate is conditional.

## Limitation.

The most apt and proper words to make a limitation of an estate, are, *Quamdiu, dummodo, dum, quousque, si*, and such like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, until *B.* go to Rome; or until he be promoted to a benefice; or until *B.* pay to *A.* or *A.* pay to *B.* twenty pounds; or so long as *I. S.* shall live; or if *A.* grant lands to *B.* to have and to hold to him, his executors, &c. if *I. S.* and *I. D.* shall live so long. Or if *A.* grant lands to *B.* to have and to hold to him for the life of *B.* so that *B.* pay twenty pounds to *A.* at Easter following; these are not conditional, but limited to estates. So if *A.* grant lands to *B.* to have and to hold to him, for so long as he shall keep himself a widower, or *dum sola fuit*, or *durante viduitate*, if the grantee be a widow, these are good limited estates, but these words do not make the estates to be conditional (1).

If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, &c. or that he shall take it again, and turn it to his own profit: or that the land shall revert, or that the feoffor shall *recipere* the land; these are either of them good words in a condition to give a re-entry, as good as the word [*re-enter*] and by these words the estate will be made conditional.

6. What shall be said a condition in law, and when an estate shall be subject to such a condition.

\* P. 126.

The tenant by the curtesy, the tenant in tail after the possibility of issue extinct, the tenant in dower, the tenant for life, the tenant for years, by statute, or elegit, gardian, &c. do hold their estates subject to a condition in law (2); so that if either of them alien his land in fee, or claim a greater estate in a court of record than his own, he doth forfeit his estate, and he in remainder or \* reversion may enter; and if such a tenant do waste, he in reversion shall recover the place wasted (3). The tenant in fee-

(1) See accordingly *Co. Lit.* 42. a. 13 edit. and note 6. thereto.—Devise of lands by a testator to his wife *durante viduitate*, is not a bar of her dower. *Lawrence v. Lawrence Dom. Proc.* 16th May 1719.

(2) Which is distinguished from a condition in deed, it being that which is implied by law, without any express words in the deed. *Co. Lit.* 232. b.

(3) Waste is either *voluntary* or *actual*, as by pulling down a house; or it is *permissive*, as by suffering it to fall for want of necessary repairs, 2 *Inst.* 145. An action of waste lies against tenant by the curtesy, in dower, for life, &c. by him that hath the immediate estate of inheritance, for waste, or destruction in houses, gardens, woods, trees, or in land, meadows, &c. to the disherison of him in reversion, or remainder, *Co. Lit.* 53. a. The doctrine of waste, tho' very material, is but little explained in the *Tenures*. It is not within the compass of a note to supply the deficiency. The editor will therefore content himself by referring the reader to some authors respecting waste, under the four following general heads in order to facilitate his inquiry into any particular point of that doctrine.

1st. What shall be deemed waste and its different kinds, *Co. Lit.* 53. a. 5 *Co.* 12. *Com. Dig.* Waste (D. 1.) 2 *Roll. Abr.* 814. 2 *Bl. Com.* 281. *Bac. Abr.* Waste (A). Observations upon estates of life respecting waste. octavo, printed for Uriel, 1777.

2d. Of what things, and in what manner, waste may be made. 5 *Co.* 12. 21. 7 *Co.* 15. *Vin. Abr.* Waste (C) and (D). *Bac. Abr.* Waste (C)

3d. By whom, and against whom, remedy may be had for it, *Co. Lit.* 285. a. 2 *Roll. Abr.* 824. 37. b. 11 *Co.* 49. *Wright's Ten.* 44. 2 *Inst.* 299. Stat. 6 Ann. c. 31. *Bac. Abr.* Waste (G.) 3 *Bl. Com.* 223. *Com. Dig.* Waste (C. 1.) 1 *Vex.* 521. 2 *Atk.* 383.

4th. At what time, and in what manner, that remedy may be obtained, *Co. Lit.* 356. a. *Br. Abr.* Waste (L. 1.) 42. *F. N. B.* 59. 2 *Inst.* 146. 306. *Bac. Abr.* Waste (I.) *Vin. Abr.* Waste (M. 3.) (L. a.) what cases *Injunction* granted, *Vin. Abr.* Waste (R. a.) *Eq. Co. Abr.* Waste. 1 *Vex.* 546. 2 *Atk.* 179.

simple doth hold his estate subject to a condition in law; so that if he alien his land in mortmain, he doth forfeit it, and the Lord may enter upon him. So also he that doth take land in exchange, doth hold it under a condition in law, *vis.* that if the land he give in exchange for that land be recovered from him that hath it, that he shall enter upon his own land again. Also every officer that hath to do in the administration of justice, all keepers of parks, stewards, beadles, bailiffs, and such like, hold their offices under a condition in law; so that if they do not duly execute it, and do not all that thereunto doth appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo est de jure puniendus* (1).

To every good condition is required an external form, *i. e.* words to declare an intent in the party to have the estate conditional, as in the cases before: and an internal form, *i. e.* such matter as whereof a condition may be made.

As to things executed, the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time, it is as good as if it were contained in the same deed. And therefore if a man make a feoffment, lease, or the like, by one deed absolute, and at the same time make another deed of defeasance or condition, and deliver both together, this is a good condition, and will make the estate conditional. But if the defeasance be sealed and delivered before, or after the deed, *contra*. And therefore if one make an absolute feoffment in fee, and before or after the sealing or delivery of that deed, the feoffor declare himself by deed, or the feoffor and feoffee agree by deed, that the estate made before, or to be made after, shall be conditional, yet this is not conditional. And yet if an annuity be granted absolutely by one deed, and after the grantee grant to the grantor, that if the grantor do such a thing, the annuity shall cease: in this case the annuity is conditional (2).

A condition may be annexed to an estate by way of use; as if a feoffment be made to *A.* to the use of *B.* and his heirs, on condition that *B.* shall pay to the feoffor twenty pounds such a day; this is a good condition. So if one covenant to stand seised of lands to the use of *B.* and his heirs, on condition that if he pay him ten pounds, the use shall be void, or the like. Also a condition may be annexed to an estate created by will; as if one devise land to *I. S.* for his life, provided that he pay ten pounds yearly to *I. D.*; this is a good condition. Whereof see in *Testament*.

A rent, or any such like thing may be granted on condition, that \* if such a thing be or be not done, the rent shall cease \* P. 127. for a time, and then revive again, and this condition is good. But in case of land it is otherwise; for that cannot be granted

7. What shall be said a good condition in deed or limitation in its original creation; and what not.

1. For the manner, frame, and order of making it.

*If A leave to B on condition of non-alienation, and after comes that B assigns to C, C takes it. Discharge from the condition, although printed and executed in the licence. Who takes it, destroyed, although mentioned in the licence.*

*2. Bargain made to A to the use of B then entailed. A then suffers. No action entered.*

(1) In like manner to all *Franchises* there is a condition in law annexed, that they shall not be misused. *Mir. ch. 5. § 4. 2 Inst. 223. Com. Dig. Condition (R.)* What shall be deemed a breach of a condition in law, see in *Com. Dig. Condition (S.)*

(2) Also rents, conditions, warranties, and such like, *inheritances executory*, may be defeated by defeasance made either at that time, or at any time after—and so the law is of statutes, recognizances, and things executory, *Co. Lit. 237. a.*



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condition 3d. clause  
has been stated as a  
defect the rest is  
good Co. Lit. 218

after this manner. Also a condition to make an estate void for a part of the time is not good. And therefore if a feoffment be on condition, that upon such a contingent the feoffor shall enter, and have the land for a time, or the estate shall be void for a part of the time; or make a lease for ten years, provided that upon such a contingent it shall be void for five years; these conditions are not good. And yet if a feoffment be made of two acres, provided that upon such a contingent the estate shall be void as to one acre only; this is a good condition (1).

A condition that a stranger, or the heir of the feoffor, shall do an act, is good; as if a feoffment be made to *I. S.* on condition that *I. D.* shall pay to the feoffor ten pounds at Easter next; or if a feoffment be made on condition that if the heir of the feoffor pay twenty shillings to the feoffee, that the feoffor and his heirs shall re-enter. But a condition to give a stranger a re-entry is void so far forth. And therefore if an estate be made upon condition, that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; however this may be so drawn, as it may be a good condition to give him, his heirs, &c. that doth make the estate, an entry, yet it cannot be good to give the estate, or the entry, to the stranger. So if a feoffment be made on condition that upon such a contingent the feoffor and a stranger shall enter; this is not good to give an entry to the stranger, but it is good to give the feoffor a re-entry. And yet by will a man may devise a term after this manner.

If a man enfeoff another, upon condition that he and his heirs shall render to a stranger and his heirs a yearly rent of twenty shillings, &c. and if he fail of payment thereof, that the feoffor shall re-enter; albeit this as a reservation of rent is merely void, and the condition that doth call it a rent, is merely mistaken, yet the condition is good, and *ut res valeat* the words shall be taken contrary to their proper sense.

If I enfeoff *I. S.* of land on condition that if *I. D.* give to him ten pounds, or go to *Rome* before such a day, &c. that then the feoffee shall pay to me ten pounds, &c. this is a good condition.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pounds, he shall have the fee of the land; this is not a good condition. But if he say further, and if he fail to pay that, the feoffor shall re-enter, this is good (2).

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter; this is a void condition, for when the issues fail, the estate is at an end.

\* P. 128.

\* Conditions that are so penned, as they are insensible and altogether incertain, are void: as if one make a lease on condition that if the rent be behind to restrain, and if there be not sufficient, the ground to enter into the premises; this condition is void for insensibility, and the estate is absolute. *Et sic de similibus.*

(1) Feoffment of two acres upon condition, and that for breach he may re-enter in one, this is a condition. *Vin. Abr. Condition (N.)*

(2) The addition of the subsequent words being material, as the feoffee had a fee simple by the words. *Co. Lit. 207. b.*

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A condition to enlarge or encrease an estate may be good, as To enlarge an estate.  
 if a gift be made in tail, or a lease be made for life, or years, on condition that if such an act be done, or not done, the lessee shall have the land to him and his heirs, as if one make a lease for life to one, and if the lessor die without heir of his body, then he doth grant the land to the lessee and his heirs for ever (1). Or if land be granted to a man for five years, on condition that if the grantee pay to the grantor within the two first years ten pounds, then that he shall have the fee-simple, otherwise that he shall have the land but for five years, and livery of seisin be made according to the deed; this is a good condition, and by this upon the performance of the condition the fee-simple will pass. So if one grant land for five years rendering rent, and that if the lessee will hold it over to him and his heirs, that he shall pay twenty pounds rent; this is a good condition, and if he pay the rent, he shall have the fee simple. So if a man make a lease for years, and at the same time, for the surety of the term to the lessee, makes a feoffment to him, upon condition that if he be disturbed in his term, he shall have the fee simple of the land, and deliver both these deeds at one time, and give livery of seisin accordingly; this is a good condition. So if a lease for life be made upon condition, that if the lessor or his heirs, pay to B. or his heirs, ten pounds at a certain day, that then the lessor may re-enter, and if he do not pay it at that time, and the lessee pay to the lessor or his heirs ten pounds at a certain day, after the former day, that then the lessee shall have the land to him and his heirs for ever; this is a good condition. But in all cases where these kind of conditions are good to make the increased estate good, there must be these things in the case. 1. There must be a precedent particular estate, as an estate in tail, for life, or years, for a foundation to erect the subsequent estate upon, and that first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity must remain until the time of the performance of the condition, for if the donee or lessee do grant away the first estate, the condition, cannot afterwards be performed, to effect and produce the encreasing estate. 3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth, shall happen, or never. 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti fiunt inesse videntur*. 5. The condition upon which the increase is, must \* be possible and lawful, for upon an impossible condition it cannot, and upon an unlawful condition it shall not, increase (2).

If one make a lease for life, provided that if the lessee die within sixty years, that his executors shall have the land for so many of the sixty years as shall be to come at the time of his death; this is no good condition to make the estate to increase, but it may be a covenant. And if a lease for years be made, on condition that if the lessor sell the reversion of the same land,

(1) And such a grant will be good as well of things which lie in grant, as of things which lie in livery, and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. *Fearne on Cont. Rem.* 203.

(2) The first four of these requisites, and the reasons for them, are mentioned in *I. d. Stafford's case*, 8 and in *Fearne on Cont. Rem.* 204. but the 5th doth not appear to be specified in either of those books.

*grantee shall have a lease for life with a term superadded*

the lessee shall have the fee of it; this is no good condition to increase the estate. And a possibility cannot increase upon a possibility, as a lease for years to a lease for life, by one contingent, and the lease for life to a fee-simple, by another. And if a lease be made to a man and a woman for their lives, on condition that which of them two shall first marry, that one shall have the fee, and they intermarry; in this case neither of them shall have the fee for incertainty.

To abridge an estate.

If a man make a lease for life, and add this condition, that if the lessee within one year do not pay twenty shillings, that he shall have but a term of two years, and he do not pay the 20s. by this his lease for life is gone, and he hath now but a lease for two years.

2. For the matter and substance of it.

If a lease be made, on condition that if a stranger dislike it, or be discontented with it, that the lease shall be void; this is a good condition.

If a lease be made, on condition that if a lessee be outlawed, the lease shall be void; it seems this is a good condition.

Prerogative.

If a feoffment be made, on condition that if the feoffee commit treason, that the feoffor shall re-enter; in this case the condition is vain, for if the feoffor enter, his entry is not lawful, for the King is intitled, and his title shall be preferred.

Testament.

No condition or limitation, be it by act executed, limitation of a use, or by devise, or last will, that doth contain in it matter repugnant, and tending to the utter subversion of the estate, or matter that is against law, or matter that is impossible to be done, is good. And therefore in all such cases if the condition be subsequent, the estate is absolute, and the condition void: And if the condition be to go before the estate, the estate and the condition both are void.

Repugnant conditions.

If a feoffment or other conveyance be made of land, or a grant of rent, &c. in fee-simple, by deed or will, upon condition that the feoffee or grantee shall not alien to certain persons, as to *I. S.* or to *I. S.* and *W. S.* this is a good condition (1). So if one make a feoffment in fee of land, on condition that the feoffee shall not alien it in mortmain; this is a good condition (2). So if *A.* be seised in fee of black acre, and *B.* doth infeoff *A.* of white acre in fee, on condition that he shall not alien black acre; this is a good condition. But if the condition be that the feoffee or grantee shall not alien the thing granted to any person whatsoever, or that if he do alien to any person, that he shall pay a fine to the feoffor; these conditions are void in the case of a common person as repugnant to the estate (3). But in case of the King, such conditions are good. And in the cases of a common person also the alienation is good until it be avoided by the feoffor. And in *Pasc. 19 Jac. B. R.* it was held by Just. *Dodridge and Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he shall pay 10*l.* to the feoffor, that this is a good condition: but Ch. Just. and Just. *Haughton* held the contrary, for then this shall be a circumvention of the law. If a gift had been made to an

\* P. 130.

Prerogative.

And Bragg and Tanner's case.

(1) And the grantee may be also restrained from alienating for a particular time. *Large's case*, 10 on 82, and 3 Leon. 182.

(2) Because such alienation is prohibited by law, and regularly, whatever is prohibited by law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*, Co Lit. 223. b.

(3) And the law is the same in a devise in fee, upon condition that the devisee shall not alien; or in any conveyance whereby a fee simple doth pass, Co. Lit. 223. a. *5 TR. 611. 5 Trin. 26. 11. 6*

6 TR. 606  
2 East 481

7 TR. 602  
2 East 481

*X* *1 Co. 54* *2 East 481* *3 East 481*

Doct. & S.  
124.

Co. super  
Lit. 224.  
10 H. 7. 11  
13 H. 7. 23  
Co. 10. 3  
Perk. Sect.  
739. 21 H.  
6. 33.

*Feoffee*

*Boyle*

Dier. 48.  
Co. 6. 43.

Co. super  
Lit. 227.  
Dier 227.

Co. 6. 43.

Co. 6. 43.  
4. 84. super  
Lit. 223.

121

(1) See ac  
resolved in S.  
of any use, c  
also Foy v. F.  
(2) 10 Co.

Abbot



Doct. & St. Abbot, and his successors, on condition not to alien, this had been  
124. a good condition.

Co. super Lit. 224. If one make a feoffment of land to an infant, on condition he shall not alien to any person; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a feoffment to a husband and wife, on condition they shall not alien; this condition to some intent is good, *i. e.* to restrain alienation by feoffment or deed, and to some intent repugnant and void, *i. e.* to restrain alienation by fine, for that is law-  
10 H. 7. 11.  
13 H. 7. 23.  
Co. 10. 30.  
Perk. Sect.  
739. 21 H.  
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So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his issues; this is a good condition. And so if land be given in tail, upon condition that the tenant in tail or his heirs shall not alien in fee-simple, fee-tail, nor for the term of any others life, but for their own lives; this condition is good. But if lands be given in tail on condition, that the tenant in tail, or his heirs in tail shall not suffer a common recovery, levy a fine with proclamations according to the statutes of 4 H. 7. and 32 H. 8. to bar the issues, or on condition that he shall not make copyhold estates of copyhold land, according to the custom of the place, or make leases according to the statute of 32 H. 8. *ca.* 28. these conditions are held to be repugnant, and for that cause void (1). And yet see, for the last of these cases, the opinion in *Co. super Lit.* 223. to be contrary, and that a condition to restrain the making of such leases is good; for this power is not incident to the estate, but given to him collaterally by the statute, and *Quilibet potest renunciare juri pro se introducto*. But *tota curia* in *Mary Portington's* case is against him (2). If a man make a gift in tail to A the remainder to him and his heirs, on condition that he shall not alien; this condition as to the estate tail is good, and void as to the other.\* And therefore if an alienation be, he shall defeat it only as to the estate tail. And if a man make a gift in tail, on condition that the donee or his heirs shall not alien; this is a good condition to some intents, and void to other, and therefore if he make a feoffment in fee, or any other estate by which the reversion is discontinued tortiously, the donor shall enter, otherwise if he suffer a common recovery. And a gift in tail, on condition that the tenant in tail shall not make a lease for his own life, is not a good condition, by *Co.* 6. 43. against *Co. super Lit.* 223. If one ~~seised~~ <sup>seised</sup> in fee of land, make a lease of it for years, or life, on condition that the lessee shall not alien the land leased, or any part thereof, during the term, or on condition that he shall not alien it, or any part of it, during the term without licence of the lessor; these are good conditions. So if one be seised in fee of a manor, and he make a lease of years of it to T. S. on condition that he shall not make voluntary estates by copy; this is a good condition. But in a feoffment in fee such a condition is repugnant and void. And if one be possessed of a lease for years, or of a house, or of any other chattel real or personal, and he give or sell all his interest therein, upon

\* *Quia* if this person  
the donor cannot take  
advantage of the condition  
as he would be in if  
his old estate were  
that would defeat  
the reversion and reversion  
man cannot take  
advantage of it in the  
condition cannot be  
limited to him, as  
the person who made  
the condition is the donor  
Tenant in Tail  
may be restrained  
from aliening by  
feoffment. But  
not by fine or  
Recovery.

\* P. 131.

(1) See accordingly power to suffer a recovery cannot be restrained by condition. 1 Burr. 84. It was resolved in *Sunday's* case, 9 Co. 128. that no condition or limitation, be it by act executed or by limitation of any use, or by a devise in a last will, can bar tenant in tail from aliening by a common recovery. See also *Foy v. Hinde*, Cro. Jac. 697.

(2) 10 Co. 39. a.

condition that the donee or verdee shall not alien the same; this condition is void for repugnancy, and the gift or sale is absolute.

If one make a feoffment of land in fee, on condition that the feoffor shall retain the land for twenty years without interruption; Dier 318. it seems this is a good condition and not repugnant.

If I grant land to another for life, if it shall please me so long to suffer him; it seems this condition is repugnant and void.

If a feoffment be made of land in fee, on condition that the feoffee shall not enjoy the land, or shall not take the profits of the land, or on condition that the heir of the feoffee shall not inherit the land, or on condition that the feoffee shall not do waste, or on condition that his wife shall not be endowed; in all these, and the like cases, the condition is void as repugnant to the estate.

If a gift in tail be made, on condition that the donee or his issues shall not take the profits of the land, or on condition that if the donee die, his estate shall go unto another, or on condition that their wives shall not be endowed, or on condition that they shall not do waste, or on condition that warranty and assents, or a collateral warranty, shall not bar the issues in tail; all these conditions are repugnant and void.

If lands be given or granted to two and their heirs, on condition that the survivor shall have the whole notwithstanding partition, or on condition that the survivor shall not have the whole albeit there be no severance; these conditions are repugnant and void.

If one make a lease for life, on condition that the lessee shall not do fealty; this condition is not good.

If lands be given to one and the heirs males of his body, provided that if he die without heirs females of his body, that the donor shall re-enter; this condition is repugnant and void.

If one have land in possession, or reversion, and he grant a rent out of it, on condition that the grant shall not charge the person of the grantor; this is a good condition, and not repugnant. But if a man grant a bare annuity, or grant a rent charge out of another man's land with such a condition, or if one grant a rent charge, on condition that the grantee shall not distrain, nor charge the person of the grantor, or if one grant a rent out of land, on condition that the land shall not be charged with it; all these conditions are repugnant and void. So if two grant a rent charge out of land, provided that it shall not extend to one of them; this condition is repugnant and void.

If a man seised in fee of land make a lease for years rendering rent, and after the lessee makes a lease to the lessor of other land, on condition that he shall not distrain for his rent in the former lease made to this lessee; this is a good condition, and not repugnant.

If one make a feoffment in fee, or lease for life, with warranty, on condition that the feoffee or lessee shall not vouch to warrant, nor recover in value, or if the lease be made without impeachment of waste, on condition that if the lessee do waste the

Co. super  
Lit. 223.  
224. 207.  
Perk. Sect.  
22. 723.

Perk. Sect.

47.

Co. 1. 24.

43.

Dier 343.

Co. super

206.

11. 53.

Ed. 3. 65.

Perk. Sect.

2. 725.

Co. 6. 41.

Per Lit.

219.

252.

Plow.

Perk.

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Conf.  
Salk.

Smalley v Penhellen

Conf. as to  
Salk. 224. 207.  
Perk. Sect.  
22. 723.

6 Co. 41. 206.  
Do Salk 224. 207.  
Perk. Sect.  
22. 723.

Conf. Feoffee  
Salk. 224. 207.  
Perk. Sect.  
22. 723.

He may alien  
the one of warranty

the lessor shall re-enter; these are good conditions, and not repugnant (1).

All conditions annexed to estates, being compulsory to compel a man to do any thing that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of any thing which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void (2). And therefore if lands be given or granted to a man, upon condition that he shall kill a man, or upon condition that he shall burn his neighbours house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the grantor whatsoever he shall do, or that if he do not these things, the grant shall be void; this condition is void (3). Or if lands be given or granted to an officer, upon condition that he shall not duly execute his office; this condition is against law, and void: *Et sic de similibus*. So if a gift be made in tail, upon condition that the donee shall discontinue, or one give or grant land, on condition that the grantee shall be a forefeather against the statutes; these and such like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof shall be employed to superstitious uses, are void. And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry, or the like, are void. And hence also such as are against the public good. And therefore it seems if one grant his land to *J. S.* on condition that he (being a husbandman) shall not sow his arable land; this condition is void (4). And in all these cases if the condition be subsequent to the estate, the condition only is void, and the estate good and absolute; if the condition be precedent, the condition and estate both are void, for an estate can neither commence nor encrease upon an unlawful condition.

\* All conditions annexed to estates, that contain in them matter impossible at the time of making of them impossible to be done, are void. And therefore if one give or grant land, on condition that a man shall go to *Rome* in three days, or on condition that a

Conditions  
against law.

Conditions  
impossible.

(1) And in case of any repugnancy or inconsistency, the condition or limitation must determine or the whole of the estate to which it is annexed; and not determine it in part only, and leave it good the residue. See *Fearne on Cont. Rem.* 3d edit. 178. and further as to repugnant conditions, *Vin. Abr.* condition (Z.) *Bac. Abr.* Condition (L) and *Com. Dig.* Condition (D. 4.)

(2) The law distinguisheth between a condition against law for the doing any act that is *malum in se*, a condition against law that concerns not any thing that is *malum in se*, but is therefore against law because it is repugnant to the estate, or against some maxim or rule in law; when therefore it is said that the condition of the bond be against law, that the bond itself is void; it must be understood of a condition against law for the doing of some act that is *malum in se*; and yet therein also the law distinguisheth a man be bound upon condition that he shall kill *J. S.* the bond is void; but if a man makes a feoffment upon condition that he shall kill *J. S.* the estate is absolute and the condition void. *Co. Lit.* 206. b. also *Carpenter v. Beer*. *Comberb. Rep.* 246.

(3) Condition to do any thing which amounts to maintenance, is void; as to save *A.* harmless from such a robbery as *B.* hath against him; this condition is against law. 18 E. 4. 28. *Roll. Abr.* 417.

(4) See more amply as to conditions against law, and therein, particularly as to bonds of resignation, the condition therein will make them void, and in what cases equity will grant a perpetual injunction to restrain them, in *Bac. Abr.* Condition (K.) *Eq. Ca. Abr.* Bonds (C.) *Com. Dig.* Condition (D. 7.) *Abr. Condition* (Y.)

K

This depends upon the nature of the condition. If it is against law, the condition is void. If it is not against law, the condition is not void.



- \* P. 133. man shall infeoff \* a corporation, when there is none such; or if one give lands in tail, on condition that the estate shall cease, as if the tenant in tail be dead; or if one grant lands, on condition that a man shall infeoff his wife; all these and such like conditions are void. And in these cases also if the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void; for an estate can neither commence nor increase upon an impossible condition. And if the thing to be done by the condition be possible at the time of the making of the condition, and do afterwards by the act of God become impossible; the condition is become void, and the estate absolute (1); as if a feoffment be made, on condition that the feoffee shall before Easter following enfeoff the feoffor, and the feoffee die before the day; or on condition that the feoffee shall appear in such a court before or at Easter, and he die before the time; in these cases the condition is gone, and the estate is absolute (2).

Limitation. And the same law is for the most part of limitations, if they be repugnant, impossible, or against law, as is before shewed to be of conditions. See more in the next division following. Co. 6. 41. 1. 84.

8. How a condition in deed or a limitation shall be taken and expounded. And how it must and ought to be performed. 1. In respect of persons. It is a general rule, that such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases (3). And therefore if a lease be made, on condition that if such a thing be not done, the lessor [without any words of heirs, executors, &c.] shall re-enter and avoid it; in this case regularly the heir, executor, &c. shall not take advantage of this condition. So if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that he shall depart; in this case if the lessor die, his heir, executor, &c. shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them. Co. 8. 90. Super Lit. 219. 27 H. 8. 14.

Not to alien. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the licence of the lessor; in this case the restraint shall continue only during the lives of the lessor and lessee and no longer. And yet this rule hath an exception; for if a man mortgage his land to W. upon condition that if the mortgagor and I. S. pay 20s. such a day to the mortgagee, that then he shall re-enter, and the mortgagor die before the day; in this case I. S. may pay the money and perform the condition. But otherwise it is whiles the mortgagor doth live, for in that time I. S. alone without him may not tender it, and if he do, this tender is no performance of the condition. And in case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be; and Co. super Lit. 219. Lit. Sect. 352. Co. super Lit. 219. Co. 8. 60.

To pay money.

(1) See accordingly the case of *Thomas v. Howel*. 4 Mod. 66. Skin. 301.

(2) When a condition consists of two parts in the disjunctive, and both are possible at the time of making the condition, and afterwards one of them becomes impossible by the act of God, a performance of the other is not compassable, 5 Co. 22. a. 3 Mod. 233. See further as to conditions impossible, Vin. Abr. Condition (C. 1.) Bac. Abr. Condition (M.) Com. Dig. Condition (D.)

(3) See accordingly 4 Leon. 241. Conditions when they tend to defeat estates are *stricti juris*, 2d Rep. 128. Roll Rep. 70. Conditions in restraint of marriage are odious, and are therefore held to their utmost rigour and strictness, per *Ld. Mansfield*, 4 Burr. 2055, *Long v. Dennis*.

*Perry v. Lyon* 9 East 170  
*Hudly v. Rice* 10 East 22  
*L. Anne Fry* 1 Vent. 199  
*Booth v. Booth* 2 Ch. Cas. 109  
*Long v. Dennis* 1 Black. 130  
*Boe v. Lawson* 3 East 278  
*Gibson v. Barker* 3 M. & S. 263

*Register Martin* 3 Ark 330  
 2 Br. Ch. Cas 488  
 2 P. W. 625 *Bayton v. Bony*  
*Agulha v. Rice* 8 East 479

Co. super Lit. 209.  
 208. 219.  
 Co. 2. 79. 6.  
 31 Lit. 353.  
 Plow. 30.  
 Perk. Sect. 155. 779.  
 794. 787.  
 793. 789.  
 788. 38 Ed.  
 3. 11.  
 Dier 311.

(1) See ac  
 (2) See fur  
 whom a cond  
 Com. Dig. Co  
 (3) If the c  
 party accepts  
 (4) And he  
 which arises u

therefore in that case albeit the words be not satisfied, yet \* if the \* P. 134.  
 intent be satisfied, it sufficeth (1). And therefore if one make a To make an  
 feoffment in fee, on condition that the feoffee shall make an estate  
 back again in tail to the feoffor and his wife before such a day,  
 and before that day the feoffor die; in this case the condition shall  
 be performed as near to the intent as may be; and therefore if the  
 condition be, that he shall make the estate to them two *Habendum* *conf. Wyllm. 11.*  
 to them and the heirs of their two bodies engendred, the remainder  
 to the right heirs of the feoffor, the estate shall be made to the wife  
 for life without impeachment of waste, the remainder to the heirs  
 of the body of the husband begotten on the wife. And if A. enfeoff  
 B. on condition that B. shall make an estate in frankmarriage to C.  
 with such a one the daughter of the feoffor; in this case albeit an  
 estate in frankmarriage may not be made, yet an estate shall be  
 made to them for their lives (2). *Et sic de similibus. Condicio*  
*beneficialis, quæ statum construit, benigne secundum verborum in-*  
*entionem est interpretanda; odiosa autem, quæ statum destruit,*  
*strictè secundum verborum proprietatem est accipienda.*

In all cases where a time is set, for the doing or performance of 2. In respect  
 the matter contained in the condition, be it to pay money, make of time.  
 an estate, or the like, it must be done at the time agreed upon, and  
 set down in the condition (3). And in cases where it is to be  
 done before a time certain, it must be done before that time, or  
 else the condition is broken. But in all cases where no time is set  
 for the doing of the thing contained in the condition, be it to pay  
 money, make an estate, or the like, if the act to be done, be to be  
 done to the party that doth make the estate, or be to be done to  
 him and a stranger, and be such a thing as is for the benefit of  
 him that doth make the estate, and for his benefit only, there regu-  
 larly the party that is to do the thing shall have time to do it  
 during his life, unless the party, feoffor, &c. that doth make the  
 first estate, whereunto the condition is annexed, doth hasten the  
 doing thereof by request; for if he request the doing thereof and  
 set no time, it must be done within a convenient time after that  
 request; and if he request and prefix a time convenient when he  
 doth desire to have it done, it must be done at that time; and in  
 these cases the condition cannot be broken without a request, so  
 long as he to whom the estate upon condition is made be living.  
 And therefore in this case it is not like to a condition made by To pay mo-  
 a will; for if one devise his land to I. S. so as he pay the ney.  
 twenty pounds to I. D. the testator doth owe him, and no time is Testament.  
 set for the payment thereof; in this case he must pay it as soon as  
 it is demanded, or he doth forfeit the land, and the heir may  
 enter. But if the thing to be done, be to be done to a stranger,  
 and be for the profit and benefit of a stranger only; as if a feoff-  
 ment be made, on condition that the feoffee shall marry the To marry  
 daughter of the feoffor (4), or on condition that the feoffee I. S.

(1) See accordingly, 10 Mod. 420.

(2) See further how a condition shall be construed, *Com. Dig. Chancery (2 Q.)* and by whom and to whom a condition is to be performed, *Bac. Abr. Condition (P.) Vin. Abr. Condition (P. a.) (G. a.) Com. Dig. Condition (G.)*

(3) If the condition be to pay money at such a day, it is sufficient if it be paid before the day, if the party accepts it, for that amounts to payment upon the day. *Co. Lit. 212. b.*

(4) And he doth not when thereunto required, but continues to hold the lands, this is a forfeiture which arises upon a breach of the condition: See 3 Bl. Com. 173.

\* P. 135 \* shall infeoff a stranger, and no time is set for the doing hereof; To infeoff. in these cases the feoffee shall not have time during his life to do it, but he must do it in a reasonable time, and that without any request at all, or else he doth break the condition (1). And in some special cases when the act to be done is to be done to the party himself, the party shall not have time to do it during his

To grant an advowson or a rent. life; as if one grant land to *I. S.* on condition that he shall grant an advowson to the grantor for his life; or on condition that he shall grant a rent charge to the grantor during his life, to be paid at Michaelmas and Lady-day; in these cases the grant of the advowson must be before the advowson fall, and the grant of the rent must be before either of the days of payment come, and that without request, else the condition is broken (2). And if the condi-

To pay money. tion be that if *I. S.* do such an act, that then the feoffee shall pay ten pounds to the feoffor, else that the feoffor shall re-enter, and no time is set when the feoffee must pay this ten pounds; in this case it seems the payment must be as soon as the same act is done, and that without any request at all. And in case where the feoffee, &c. or a stranger, be to do an act, and he alone is to do it, and it doth nothing concern the feoffor, &c. as to go to *Rome*, or the like, there the feoffee, &c. or stranger shall have time during his life to do the thing, and it cannot be hastened by request.

To make a lease. If lands be granted, on condition that the grantee shall make a lease for life of other lands to the grantor, the remainder to a stranger; in this case the feoffee shall have all the time of his life to do it, if he be not hastened by request. But if the condition be to make a gift in tail to a stranger, the remainder to the feoffor; in this case it must be done in time convenient without request.

If the King licence his tenant to infeoff *A.* and *B.* so as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this case it must be reconveyed before the death of the feoffor, or else the condition is broken.

To infeoff. If *A.* infeoff *B.* of black acre, on condition that if *C.* infeoff *B.* of white acre *A.* shall re-enter; in this case *C.* shall have time to do this during his life, if *B.* do not hasten it by request.

To get the good will of *I. S.* If a lessee grant his estate to a stranger, on condition that the grantee do get the good will of the lessor, and no time is set when he shall get his good will; it seems in this case he shall have time to get his good will during the term, and that although he deny it at the first, yet if he grant it afterwards that this is sufficient.

When a time is set in certain for the payment of money, or the doing of any other thing generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certain, but no hour of the day is set

\* P. 136 down wherein the \* same shall be done; in this case they must

(1) See accordingly *Bac. Abr. Condition*, pl. 26. and pl. 217.

(2) If a man grant an advowson, upon condition that the grantee shall regrant the same to the grantor in tail, in this case if the church become void before the regrant, or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight it was at the time of the grant. *Co. Lit.* 222. b.



attend such a distance of time before the sun set, as may be convenient to do that work in. And if the condition be to pay money To pay money at a place certain, at any time during life; in this case the money may not be tendered at any time in the place, in the absence of him that should receive it; but he that is to pay it must give notice to the other party before hand, at what time he will tender it, that the other may be ready to receive it. Or if at any time the parties happen to meet at the place, a payment or tender then at that place is sufficient (1). And the same law is for the most part in Obligation. conditions of obligations (2).

In cases where a place is set down for the doing of the thing 3. In respect contained in the condition, there it must always be done at that of places. place, unless by some agreement made between the parties afterwards another place be appointed; otherwise the condition is not performed, and the parties are not bound to attend in any other place (3). But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it must at his peril seek out the person to whom it is to be done, if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to seek him, and yet the condition is not broken. And if the thing to be done be either local, *i. e.* such a thing as must be done in or at a place To pay money certain, as the making of a feoffment of land, payment of rent, or the like; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition: as for example, if a feoffment be made, on condition that the feoffee shall pay to the feoffor twenty pounds on Easter-day at *Dale*, and the feoffee tender the twenty pounds the same day at *Salé*; and albeit the feoffor be at *Salé*, and he tender the twenty pounds to his person there the same day, yet this is no performance of the condition. And if a feoffment be made in mortgage on condition for the payment of money at a day, and no place is set for the payment thereof; in this case the mortgagor must seek the mortgagee and tender it to his person at his peril; and tender of the money upon the land mortgaged, is not a sufficient performance of the condition (4). And if a feoffment be made, on condition that the To in feoff. feoffee shall in feoff the feoffor of white acre in *Dale*; in this

(1) See more fully as to the time of performance of a condition, *Vin. Abr.* Condition from (C. b.) to M. b.) *Com. Dig.* Condition, (G. 3.) *Bac. Abr.* Condition (P. 3).

(2) See the chapter on obligations.

(3) Where a certain place is appointed for payment, the one party is not bound to pay nor the other accept payment in any other place. 1 *Roll. Abr.* 444.

(4) The mortgagor in order to perform the condition, and make a sufficient tender, must be attentive likewise to the time and manner of making his tender: as to the time, if the payment is mentioned to be made on the day indefinitely, any convenient time before the last instant of the day is the uttermost time pointed by law, *Co. Lit.* 202. a. See also *Com. Dig.* Condition (G. 8.) with respect to the manner of making a legal and sufficient tender of the mortgage money, if the condition be (as it usually is) to pay money of Great Britain, that is to be understood money coined by the King's authority, or foreign money by proclamation made current within the realm, *Co. Lit.* 207. a. 5 *Co.* 114. b. and though it may be very inconvenient to a mortgagor to procure the whole sum in cash, yet he is to consider that Bank notes are not strictly a legal tender, unless offered to be turned into money. *Eq. Ca. Abr.* Mortgages (A) pl. 9. *Vin. Abr.* Tender (B.) The mortgagor may bring the money in purses or bags, without showing or telling it; it being incumbent on the mortgagee to put it out, and tell it. It also becomes the mortgagee to inspect the goodness of the money; for if there is any bad money in the bags, and the mortgagee accepts it, the mortgagor is not bound to change it.—5 *Co.* 11. *Co. Lit.* 208. a.—See further in *Vin. Abr.* Tender (E).

*Right v. Ruel Dropped v. Sat 1790 Hil.*

case

To acknow-  
ledge satis-  
faction.

\* P. 137.  
To pay rent.

To deliver  
wood or  
corn.

Obligation.

A caveat.

4. In respect  
of other  
matters.  
To pay mo-  
ney.

To make an  
estate.

case the feoffment, or the tender of it must be in *Dale*, and cannot be elsewhere, and a tender of it there is sufficient to perform the condition. So if the condition be, that the feoffee shall in Easter Term next acknowledge satisfaction upon a judgment in the *King's Bench*: this must be done there, and cannot be done elsewhere. So if a feoffment in fee be made of white acre, rendering rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and \* no place is set for the payment of it; in this case the feoffee is not bound to render his rent any where for the saving of the condition, but upon the land, and a tender there is sufficient. And if a man make a feoffment in fee, without any reservation of rent precedent in the deed, on condition that the feoffee and his heirs shall render a yearly rent of twenty shillings a year to the feoffor and his heirs, and if they fail, that the feoffor shall re-enter; in this case also it seems the payment or tender must be upon the land. But if the condition be, that he shall render twenty shillings a year to a stranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this case the feoffee must tender it to the person of the stranger where he can find him at the day, or else he doth break the condition; and tender upon the ground is not sufficient. But in these cases if the nature of the thing to be done be such as will not admit of such a carriage from place to place, to seek out the person of the feoffor, &c. there albeit the thing to be done be corporal or transient, and not a local thing, yet he that is to do it shall not be bound to seek out the person of the other; as for example, if an estate be made, on condition that the grantee shall deliver twenty quarters of wheat, or twenty loads of wood to the grantor at such a time, and no place is set for the doing thereof; in this case the grantee is not bound to carry the same about to seek the feoffor or grantor, as he is bound to carry money; but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it must be tendered. And the like law is for the most part in conditions of obligations.

It is best therefore in all these cases, and herein he that is to be the agent is to take care to have certainty of time and place set down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him (1).

If a lease be made, on condition that the lessee shall pay to the lessor all such sums of money as the lessor shall lay out in such a business; in this case, the lessor must first tender to the lessee a note of the charges; before the lessee is bound to pay; and until this be done, the condition cannot be broken. And after a note is given also, he shall have some reasonable time to provide the money. And if he tender him a note of more than in truth he doth lay out, the lessee, if he know it, may pay so much as is laid out, and he may refuse to pay any more.

If lands be granted, upon condition that *A.* shall make an estate of lands at the charges of *B.* in this case *A.* must do the first act, viz. notify to *B.* what assurance he will make, before *B.* is bound to tender the charges.

(1) See further as to the performance of a condition at a certain place, in *Bac. Abr. Condition* (P. 4) *Vin. Abr. Condition* (U. b.) *Com. Dig. Condition* (G. 9.)

Pasche 17. Jac. B. R. If a feoffment be made, on condition that the feoffee shall give so much household stuff to the feoffor, or so much money for it as it shall \* be rated at by two indifferent persons to this end to be chosen; it seems in this case, the election of the two men must be by the feoffee: but if the words be by two persons to be indifferently chosen, then the election shall be by both parties, for in the first case the word indifferent doth go to the praising, not to the persons. To deliver household stuff, or pay money. \* P. 138.

27 H. 8. 1. Plow. Colthirst's case 21. If a feoffment be made of a ground, on condition that the feoffee shall rake the ditches; in this case if the feoffee do it once, it is a sufficient performance of the condition. And yet if a man grant a house for life, on condition that the lessee shall dwell and be resident in the house during the said term; in this case it is not sufficient that he dwell in it once during the term, but must do so all the term, or else the condition is broken. To cleanse ditches. To dwell in the house.

Perk. Sect. 304. If an annuity be granted of ten marks *per annum* to a man, on condition; or till he be promoted to a benefice by the grantor, and it is not said of what value the benefice shall be; in this case it shall be taken for a benefice of as great value, and of as good an estate as the annuity is; otherwise the grantee may refuse it, and yet his annuity shall continue. To give goods.

Perk. Sect. 742. If a feoffment be made, on condition that the feoffee shall give all his goods *si quæ fuerint*, or give all his pikes in his pond *si quæ fuerint*; in this case the words shall be taken in the present tense, for the goods and pikes that are at the time of the grant. But if a feoffment be on condition that the feoffee shall give all his goods in *London si quæ fuerint*, that did belong to T. S. in this case the words shall be taken in the preterperfect tense.

Haward & Fulcher's case. Hil. 3. Car. B. R. If one make a lease of the manor of *Dale* (wherein is a wood called *Dale-wood*) excepting all the woods, and under-woods, growing in *Dale-wood*, and all the great trees growing elsewhere, and this is upon condition, that if the lessee shall disturb the lessor to cut and sell the wood and underwood excepted, the lease to be void; in this case it seems the condition shall extend only to the wood and underwood in *Dale-wood*, and not to the trees elsewhere: but if the words of the condition be [shall disturb, &c. to cut, &c. the wood and underwood on the premises] *contra*. Not to disturb the lessor for in taking the wood.

Dier 142. If one grant land rendring rent at the feasts of *S. Michael* and *Lady-day* or within a month after, on condition that if it be behind after the feasts and days limited by the space of eight weeks, that the lease shall be void; in this case the eight weeks shall be accounted from the month which is the twenty eight day after the feast. To pay rent.

12 H. 7. 10. Co. super Lit. 225. Perk. Sect. 746. Dier 337. 372. If the condition be made in the copulative and consist of divers parts, every part must be observed, or the condition will not be performed (1). But when it is made in the disjunctive, if any part of it be observed it is a sufficient performance of the condition. And therefore if a feoffment be made, on condition to reinfeoff and pay \* twenty pounds, and the feoffee do reinfeoff but not pay \* the twenty pounds; in this case the condition is broken. But if \* P. 139.

(1) But if such condition copulative is impossible to be performed, it shall be taken in the disjunctive. Owen 52. As where the condition is, *that he and his executors shall do such a thing*, this is in the disjunctive, because he cannot have an executor in his life time. Roll. Abr. 444. ante 115.



the condition be to re infeoff or pay twenty pounds, and the feoffee do one of them ; it is a good performance of the condition (1). And when it is made in the copulative and disjunctive both, it shall be taken in the disjunctive only ; as, if a lease for years be made to *A.* and *B.* his wife, on condition that the said *A.* and *B.* or any child between them shall so long live ; this shall be taken in this sense if the husband, wife, or child shall so long live ; so that the lease shall not be determined by the death of the husband or wife alone (2). If there be two provisos in two several indentures of conveyance of several manors to *A.* and *B.* that if the feoffor pay or tender twenty shillings to *A.* and *B.* or the heirs of *A.* that the conveyance shall be void, and *A.* die ; in this case tender to *B.* is not sufficient, and it must be made to the heir of *A.* and it must be twenty shillings for every proviso : but otherwise it is of a collateral act.

If the words of a condition be thus, that upon such a contingent the party shall enter and retain the land until the thing be done, &c. in this case, and by these words, the estate is not determined ; as it is by these words, [that the estate shall be void, or that the grantor shall re-enter, or the like]. And in these words there is a difference also to be observed ; for if the words be, that upon such a contingent the estate shall cease and be void, and it be a lease for years to which the condition is annexed, the estate is *ipso facto* void without entry, or claim, and can never be affirmed afterwards ; but if the words of the close of the condition be, that the feoffor, lessor, &c. shall re-enter, without any other words, albeit it be in a lease for years, yet the lease is not void until he hath made an actual re-entry. But in both cases if the estate to be avoided be an estate in fee, or for life, it is only voidable by the breach of the condition, and must be made void by entry, or claim ; and until this be done, the grantor can make no new estate of the land. But in the first case before, the party shall retain the land and take the profits of it in the nature of a pledge, until the thing be done agreed upon in the condition, and then the other party shall have the land again. See more in the next questions. And in *obligation numb. 7. covenant numb. 6.*

9. When and how a condition or limitation shall be said to be performed ; or not.

1 When the act is to be done between the parties themselves. To make an estate.

\* P. 140.

The words of a condition may be performed, and not the intent ; and the intent may be performed, and not the words ; and then for the most part a condition is performed when the intent and meaning of it is observed. And therefore if a feoffment be made, on condition that the feoffee or his heirs shall make an estate to the feoffor and his wife in tail before such a day, and before the day the husband die, and then he make an estate as near it as he may, *viz.* to the wife for life without impeachment of waste, and after to the heirs of the body of the husband ; this is a good \* performance of the condition. And if the condition be that the grantee shall make a feoffment of land ; and he make a lease of the land first, and then a release to the lessee and his

Co. 3. 64.  
Super Lit.  
203, 204.  
Dier 6. 127.  
11 H. 7. 11.

Co. 8. 50.  
Lit. Sect.  
352.  
Co. 3. 64.  
282.  
2 H. 4. 11.

Co. Super  
Lit. 207.  
B. 7.  
V. 11.  
B. 2. 11.

(1) If *A.* obliges himself to pay to *B.* ten pounds, or so much as *J. S.* shall appoint, if *J. S.* will not appoint any sum to be paid, *A.* shall pay the ten pounds, *Lutw.* 694. What shall be deemed a condition disjunctive, how it shall be performed, and when the performance shall be excused, see in *Com. Dig.* Condition (K.)

(2) See accordingly the case of *Baldwin and Cocks*, 1 *Leon* 74. *Owen* 52, S. C.

heirs

Co. super  
Lit. 222.  
Perk Sect.  
302, 303.

Co. 5. 96. &c.  
Super Lit.  
208. 207.

Lit. Sect.  
34. 537.  
5 H. 7. 2.  
Co. super  
Lit. 206.

Lit.  
Sect. 125.

(1) If a man  
and release to  
flow 7. It  
(2) Because  
feoffee has the  
the Co. Lit.  
of the mortgag  
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heirs; this is *tantamount* and a good performance of the condition (1).

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pounds by a day, the feoffment to be void, and the feoffor before the day doth commit treason and is executed, and so dieth without heir; and after, before the day, the heir is restored, and he at the day doth pay the money; in this case this is a good performance, notwithstanding there was once a disability. So as if heretofore one had made a feoffment, on condition to reinfoff by a day, and before the day the feoffee had entered into religion, and then had been dearraigned, and at the day had made the feoffment; this had been a good performance of the condition.

If a feoffment be made, upon condition that if the feoffee shall pay to the feoffor ten pounds such a day, that then he shall have the land to him and his heirs, otherwise that the feoffor shall re-enter; or if it be made on condition that the feoffee shall pay ten pounds to the feoffor such a day; and before the day the feoffee sell the land; in this case the seller, or the buyer either of them may tender the money at the day, and this will be a good performance of the condition; for he that hath interest in the land on the one side, or in the condition as party or privy on the other side, may tender and perform the condition to save the estate.

If lands be mortgaged, or (which is all one) if a feoffment be made of lands on condition that if the mortgagor or feoffor pay ten pounds to the feoffee such a day, that then the estate shall be void, and before the day the mortgagor or feoffor die; in this case the heir or executor of the feoffor, the ordinary, the gardian in chivalry or socage of the heir of the feoffor, or any other by either of their commandment precedent, or assent subsequent, may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition (2). † And so Testament.

(1) If a man is bound in an obligation upon condition to infeoff J. S. and he makes a lease for years and release to him in fee; he has performed the condition, although he has not performed the words. *law. 7.* It is well performed, because this in law amounts to a release. *Br. Abr. Condition pl. 158.*

(2) Because they represent the person of their testator, &c. and have an interest in the land; and the feoffee has the same advantage if the payment be made by the heir, &c. as if it were by the feoffor himself. *Co. Lit. 209.* but if the money is not paid at the day, whereby the condition is lost, and the estate of the mortgagee becomes absolute at law, the mortgagor is allowed in equity to redeem, on payment of the money due; and this is called his equity of redemption. The doctrine of redemption of estates in mortgage is very interesting, and very extensive. The reader will find a full explanation of the nature of it, what persons are intitled to it, after what length of time, and in what manner, in *Bac. Abr. tit. Mortgage (E.) Com. Dig. Chancery (4 A. 4.) Vin. Abr. Mortgage (Q.)* The mortgagor upon non-payment according to the condition, became irrelevant, except in a court of equity, until the statute of 7 Geo. 2. c. 20. That act recites, that in ejectments by mortgagees for the recovery of the mortgage lands and in actions on the bonds given by the mortgagors to pay the money, courts of law have not power to compel mortgagees to accept the principal and interest due to them and costs, or to stay mortgagees from proceeding to judgment in such actions, but mortgagors must have recourse to a court of equity, in which case courts of equity do not relieve till the hearing of the cause: For remedy thereof it is enacted, that in action on bond for payment of mortgage money, or in ejectments in any of the courts at Westminster, at sessions in Wales, or in the counties palatine of Chester, Lancaster, or Durham, for the recovery of mortgaged lands, when there is no suit depending in equity for foreclosing thereof, If the person having right to redeem, and who shall become defendant in such action, shall, at any time pending such action, pay such mortgagee, or, in case of his refusal, bring into court, all principal and interest due on the mortgage, and all costs, the monies paid to such mortgagee, or brought into court, shall be in full discharge of the mortgage, and the court may compel such mortgagee to re-convey the mortgage lands, and deliver up all deeds relating to the title thereof. And it also enacts that in all suits in equity for foreclosing, courts of equity, upon application made by the defendant having a right to redeem, and upon admitting plaintiffs right, may at any time before the cause be brought to hearing, make such decree thereon, as they could have made in case such cause had been regularly brought to hearing.

also

*Kenble & Scribner 2. Part on equity of life*

also is seems is the law upon a devise of land to *I. S.* paying to *I. D.* twenty pounds; if *I. S.* die, his heir or executor may pay the twenty pounds, and this is a good performance of the condition. But in these cases, if a stranger, of his own head without any such commandment or agreement, pay the ten pounds; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an idiot; the payment or tender by any one in his behalf shall be a good performance of the condition (1). And if a feoffment be made, on condition Lit. Sec. that if the feoffor pay ten pounds to the feoffee, that the estate 337. shall be void, and no time is set for the payment of this money, and the feoffor die before any payment or tender made; in this case his heir cannot tender it and so perform the condition.

\* P. 141. \* If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pounds such a day, the feoffment to be void, and the feoffor die before the day, and *I. S.* alone pay it; this is a good performance of the condition. Co. super Lit. 207. Bro. Condition 109.

If a feoffment be made, on condition that the feoffor pay to the feoffee or his heirs ten pounds such a day, and before the day, the feoffee doth grant the land away to another; in this case the money may be paid to the feoffee himself, or if he be dead to his heirs, and this payment is a good performance of the condition (2). And if the words of the condition be [that if he pay to the feoffee, his heirs or assigns, &c.] in this case, payment to either of them is a good performance of the condition; so as if in this case the feoffee make a feoffment over, it is in the election of the first feoffor to pay the money to the first or second feoffee, and if the first feoffee die, to pay it to his heir or the second feoffee. But payment to an executor or administrator in this case is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without the words, heirs, executors, &c.] ten pounds such a day, in this case the payment may be made to the executor or administrator of the feoffee after his death, and such a payment is a sufficient performance of the condition: and if the words of the condition be [that if the feoffor pay to the feoffee, his heirs, executors or administrators, &c.] in this case payment to either of them, is a good performance of the condition. But payment to an assignee in this case is not good (3). And if the words be, that if he pay to the feoffee and his heirs, &c. in this case payment to his executors, or to his assigns is not a good performance of the condition. So that in all these cases, it seems that, as to the person to whom payment is to be made, the words of the condition are precisely to be pursued. Co. super Lit. 210. 6. 96. Dier. 101. Co. 6. 69. Lit. Sec. 339.

To tender money.

If a feoffment be made, on condition that if the feoffor shall tender twelve pence to the feoffee such a day, the feoffment to be void, and afterwards the feoffee is disseised of the land, and after the feoffor doth tender the twelve pence to the

(1) If the heir be an Idiot of what age soever, any man may make the tender for him in respect of his absolute disability; and the law in this case is grounded upon charity, and so in like cases. Co. Lit. 208. 2. Vin. Abr. Condition (K. 2.) pl. 10.

(2) And in such case the money shall not be paid to the executors. 5 Co. 96. b.

(3) If the words of the condition are, to pay the feoffee, his executors or assigns, and the feoffee make his sons his executors, and dies, and administration is committed during their minority, the safest way is to pay the money to the executors or one of them, the administrator being but a bailiff to them. Leon. 103.



feoffee at the day; this is a good performance of the condition.

Pier 69. If a feoffment be made to two men, on condition that they shall To rein-  
E. 3. 23. reinfess the feoffor, or make a lease to him by a day, and be- feoff.  
 for the day one of them die, and the survivor doth reinfess, or  
 make the lease; this is a good performance of the condition.  
 And so also it seems the law is, if both the feoffees be living, for  
 by his own acceptance it seems he hath dispensed with the condi-  
 tion, and so cannot enter for the breach of it.

Mow. 23. If a feoffment be made on condition, that the feoffee shall in-  
H. 7. 4. feoff the feoffor of the manor of Dale by such a time, and before  
H. 6. 101. the time appointed the feoffee doth grant a rent charge out of  
 the manor to a stranger, and then at the time appointed makes  
 a feoffment of the manor according to the condition; in this  
 case, this is a good performance of the condition. But if in this  
 case the feoffee before the time appointed grant away to a  
 stranger twenty acres parcel of the manor, and then doth make  
 a feoffment of the manor according to the condition; this is  
 no good performance of the condition. And if a feoffment be  
 made on condition that the feoffees or lessees, in trust, of such  
 land shall grant an annuity out of it, and some of them only  
 do grant this annuity; this is no good performance of the con-  
 dition. \* P. 142.

E. 3. 22. If there be a feoffment made, upon condition that the feoffee To make a  
 shall make a lease of land to the feoffor for life, the remainder to lease.  
 I. S. in fee, and the feoffee make a lease to the feoffor for life,  
 and after by another deed doth grant the reversion to I. S. this  
 is a good performance of the condition.

Pier. Sect. If a feoffment be made, upon condition that the feoffee shall To purchase  
107, 808. purchase lands or tenements to the value of twenty pounds *per an-* lands.  
H. 6. 28. num, and he purchase a rent, common, or any such like thing,  
Pier 15. to that value; this is a good performance of the condition. But  
 if in this case the feoffee and another purchase so much land to-  
 gether jointly; this is no good performance of the condition. So  
 if the feoffee alone purchase lands to the value of twenty pounds  
*per annum*, and there is a rent issuing out of it which must be  
 deducted; this is no good performance. And yet in these cases,  
 if the stranger joint-tenant release to the feoffee all his right in  
 the land, or the grantee of the rent release to him the rent before  
 the time of the performing of the condition, the condition is well  
 performed in both cases. *Tantum valet terra quantum vendi po-*  
Pier. Sect. *test.* And if one make a feoffment in fee, on condition that if  
12. the feoffee purchase land to the value of twenty shillings, the  
 feoffment shall be void, and after the feoffee disseise another man  
 of land to that value; it is said that by this the condition is per-  
 formed; *Sed quere.* And if he recover so much land in value in  
 an action; that this is no performance of the condition: *Sed*  
*quere.* For this seems to me a better performance of the con-  
 dition than the former. Payment.

Pier 187. If lands be granted, on condition to pay money, and the mo- To pay  
11. Sect. ney is tendred according to the condition, but either no body is money.  
34, 335. ready to receive it, or it is refused; this is a good performance of tender.  
38. the condition. And after a man hath once refused the money so  
10. Super tendred to him according to the condition, he hath no remedy  
11. 209. in law to recover it, except it be money lent upon a mort-  
 gage.

Acceptance.

\* P. 143.

gage. <sup>a</sup> And if the payment be made part of it with counterfeit coin, and the party accept it and put it up; this is a good payment and consequently a good performance of the condition.

<sup>b</sup> And if at the day of payment the parties do account together, and he to whom the money is to be paid being indebted to the other, that debt by <sup>a</sup> agreement is allowed, and the residue is paid and accepted; this is a good performance of the condition.

<sup>c</sup> So if the party that is to receive it, accept and take new security by bond or statute for the money; this is a good performance of the condition.

<sup>d</sup> And so in most cases, when by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way; this is a good performance of the condition (1). *Volenti non fit injuria*. But if the thing to be done, be to be done to a stranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof; this is no performance of the condition. And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me ten pounds, such a day, the feoffment shall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heir and me, he doth pay me the ten pounds, and I receive and accept it, and thereupon I suffer him to enter and hold the land; in this case the condition is not performed, but I may enter upon him and oust him notwithstanding.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed, and the mortgage discharged notwithstanding.

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or administrators of *I. S.* ten pounds the feoffment shall be void, and *I. S.* die, and the ten pounds are paid to the executors of *I. S.* according to the condition, but it is covinously done, *i. e.* there is a private agreement, that the feoffor shall have all, or part of his money again; this payment in this case, is no good performance of the condition: but that payment that must be a performance of a condition in this case to fetch lands out of the hands of an heir, must be real, full and effectual.

To get the good will of *I. S.*

If a lease be made, on condition that the lessee shall get the good will of *I. S.* and the lessor doth come to *I. S.* first, and ask his good will, and he deny it him, and after when the lessee doth ask it, he doth grant it him; in this case the condition is performed. So if the condition be, that he shall get his good will by such a day, and at the first being desired he denied it, but afterwards and before the day he doth grant it. And yet if no day be set, and he desire his good will and *I. S.* denieth it and afterwards, he doth get his good will; it seems this is no performance of the condition.

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed.

(1) See accordingly *Goodale v. Wyet*, Cro. Eliz. 283. *Moor* 708.

If a feoffment be made, on condition that if the feoffor and *I. S.* \* pay ten pounds at Michaelmas, the feoffment shall be void, and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor be living *contra*.

If a feoffment be made, on condition to make an estate to a stranger by a day, and before the day he die; in this case if an estate be made as near the condition as may be, it is sufficient.

† If a feoffment be made to *I. S.* on condition that he shall infeoff *I. D.* and his heirs; and *I. S.* doth tender the feoffment to *I. D.* and he doth refuse to take it; this is no performance of the condition in this case. But if it be to be done to the feoffor himself, *contra*. And so also it is, if the condition be to make an estate tail, or any lesser estate to a stranger, and he tender it, and the stranger refuse it; this is no good performance of the condition. And if a feoffment be made, on condition to reinfeoff the feoffor and his wife in tail, the remainder to *W.* in fee, and he tender it to the wife only, and not to him in remainder; this is no good performance of the condition (1).

And the same law for the most part is in conditions of obligations. See more in *obligations* at numb. 9.

If a feoffment be made, on condition that the feoffee shall not infeoff *I. S.* of the land, and the feoffee doth make a feoffment to *I. S.* and *I. D.*; this is a breach of the condition. And so also it is if the feoffee make a feoffment to *I. D.* to the intent that he shall alien to *I. S.* *Quando aliquid prohibetur fieri directo prohibetur & per obliquum*. And yet if the feoffee in the case before alien to *I. D.* and after he doth alien to *I. S.* this is no breach of the condition. And if the condition be, that the feoffee shall not infeoff *I. S.* and he die, and his heir infeoff *I. S.* this is no breach of the condition.

If a lease for years be made, on condition that the lessee shall not assign, or alien, the term, or the land, during his life, without the licence of the lessor, and the lessee doth give it by his will without licence; this is a breach of the condition and forfeiture of the estate. But if he make an executor of his will only, this is no breach. And if the condition be that the lessee shall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the lessee shall not alien but to his children, and the lessee by will devise it to his executors; it seems this is a breach of the condition. So if he devise that *A.* his son shall have his term after his wife, and doth make *A.* his son his executor; it seems this is a breach of the condition. But if he do not make *A.* his executor *contra*. And in cases of devise, albeit the executors do not assent, yet the condition is broken, as in case where a reversion is granted on condition that the grantee shall not alien it, and he doth alien it, but no attornment is to this grant; yet it seems this \* is a breach of the condition. And if a lease for years be made, on condition that the lessee or his assigns shall not alien, and the lessee doth make his wife his executrix, and she doth take another husband, and he

\* P. 144.  
2. When the act is to be done by a stranger. To pay money.  
3. When the act is to be done to a stranger. To make an estate.  
† Tender.

10. What act shall be a breach of a condition in deed: and when a condition in deed shall be said to be broken: or not.  
Not to alien.

as the heir of the freehold

\* P. 145.

) See more amply by whom, and to whom, a condition is to be performed, in the references in note page 131. See further *Marks v. Marks*, *Str.* 129. *Vin. Abr.* Conditions (K. a.) (l. a.)



*Supper can*

doth alien it; it seems this is a breach of the condition, and a forfeiture of the estate. But if a lease be made on condition that the lessee shall not alien without the licence of the lessor, and after the lessor die, and the lessee assign, or the lessee die, and his executors, or administrators, assign; this is no breach of the condition in either of these cases (1). So if a lease be made, on condition that the lessee shall not alien the term during his life, and he makes an executor, but doth not devise it to him; this is no breach of the condition. And if a lease be made, on condition that the lessee his executors or assigns shall not alien the term to any persons without the licence of the lessor, but to the wife, or one of the children, of the lessee, and the lessee die, and his executors alien to one of the children of the lessee, and he alien to a stranger without licence; this is no breach of the condition (2). And if one make a lease of a house and land, on condition that the lessee shall not parcel out the land or any part of it from the house, and the lessee doth grant all his term in the house and part of the land, and doth keep the rest, and after doth lease that part also; this is a breach of the condition.

Dier 121.  
Co. 4. 110.

Hil. 38. B.  
Murrh v.  
Curtis.

*Rolls Abr. 427  
the 1<sup>st</sup> grantee  
a breach  
none 425*

Not to suffer a woman with child in the house.

If a lease be made of a house, on condition that the lessee shall not suffer any woman great with child to harbour or lodge in the house six days after notice given by the lessor, and the lessee do suffer any such person after notice given, albeit the lessor consent to it; yet the condition is broken. But if the lessor do *volens* keep such a woman there against the mind of the lessee; this is no breach of the condition.

Co. 8. 91.

Not to do waste.

If a lease be made, on condition that if any waste be done, the lessor shall re-enter; in this case if the house fall by a tempest, this is no breach of the condition, for this is not waste; but if it be uncovered by tempest, and the tenant hath a convenient time to repair it, and doth not, but doth suffer the timber to perish for want of covering; this is a breach of the condition, and the lessor may enter and put out the lessee. † And if a lease be made, on condition that the lessee shall not do waste, and he suffer waste to be made in decay of the houses, &c. it seems the condition is broken. *Sed quere* (3).

12 H. 4.  
Bro. Condition 40.

Not to sell it to any other till the lessor refuse it.

If a lease be made, on condition that if the lessee be minded to sell his estate the lessor shall have the first offer thereof, giving as much as another will give; in this case if the lessee doth not give notice when he is minded to sell it, he doth break the condition; but if when he is minded to sell, he doth tell the lessor of \* his purpose, and what he is offered for it, and the lessor doth either say he will not have it, or that he will not give so much for it, or doth not accept it, but doth delay, &c. and then the lessee doth sell it to another; this is no breach of the condition, neither is he bound to wait upon him in this case.

† Per Dier  
and Walk  
Justices.  
Dier 281.

Co. super  
Lit. 221. 110.  
Co. 1. 4.  
Perk. Sect.  
801, 809.  
Lit. Sect.  
355.

To make an estate.

If a feoffment be made, on condition that the feoffee shall make a feoffment in fee, gift in tail, lease for life, or years, of

Co. super  
Lit. 206.

(1) And if the condition be not to alien the land, nor any part thereof, and the lessee aliens part of the lessor's assent, he may afterwards alien the residue without his assent; the whole condition being put for it cannot be divided, *Rolls Abr.* 471. See further *Com. Dig. Condition* (Q.)

(2) In *Dyer* 152. a. *Brook, Brown*, and *Dyer* held that by the grant to one of the sons, the residue was not determined, and that the son could not grant over to a stranger without licence, but *Stamford Catline*, *contra*. See further the case of *Thornhill and Adams v. King and wife*, *Cro. Eliz.* 757.

(3) See ante page 122, and note 3. thereto.

the land, to the feoffor, or to a stranger by a day; and before the day the feoffee doth disable himself to do it, either by making some estate of the same thing to some other person in tail, for life, years, in present, or future, or for one year, or by taking a wife whereby she may be intitled to dower, or by suffering a recovery of the land, or by granting of any rent, common, or the like, or by entering into any statute, &c. or by suffering any judgment to be had against him, or by doing any other such like act, whereby he cannot convey the land according to the condition in the same plight, quality, and freedom it was in at the time of the conveyance made; in either of these cases the condition is *ipso facto* broken. And albeit the land be afterwards discharged, and the party again enabled before the day to perform the condition, yet this will not save the breach. And so also it is of a limitation. But when the condition is to be performed on the part of the feoffor or grantor, there disability before the time will not hurt, so as he be again enabled at the time. And so also it is when the condition is to be performed on the part of the feoffee, and there is no certain day set for the performance of the thing, for in this case albeit he be once disabled, yet if he be afterwards again enabled, and do it within the time that the law doth give him to do it; in this case the condition is not broken. And so also it is, if the feoffee be disseised, and, during the disseisin, he do any such act as before; in this case before his entry this is no breach of the condition, for till then the charge doth not bind the land. And so likewise it is when the disability doth proceed from another cause, as where one doth make a feoffment, on condition that the feoffee shall reinfeoff before such a day, and before the day the feoffor disseise the feoffee, and keep him out till the day be past; or one doth make a feoffment, on condition the feoffee shall marry *B.* before such a day, and before the day the feoffor himself doth marry her, so that the feoffee cannot perform the condition; in these cases the condition is not broken.

If one make an estate of lands (held in capite) on condition that he to whom it is made, shall imploy the profits thereof to divers charitable uses, and he die, his heir within age, by reason whereof the King hath the land during the minority of the \* heir, so that the profits cannot be employed; this is no breach of the condition.

If one make a feoffment of land, on condition to reinfeoff in convenient time, and the feoffee doth not so, but doth make a feoff. lease to another; this is a double breach of the condition. And the same law is of a devise by will in this manner.

If a feoffment be made, upon condition that the feoffee shall make some estate to the feoffor, or some other, by a day, and the feoffee before the day, say to him to whom the estate is to be made, that he will never make the estate, and notwithstanding he doth make the estate before the day according to the condition; in this case it is said the condition is broken. *Sed quere* of this, for it seems if he really deny it before, and actually perform it at the day; that this is a good performance of the condition. As if a lease be made of a house, on condition that the lessee shall not disturb the lessor in the taking away of his goods

conf: p. 142

I don't understand this  
950

To employ the profits to charitable uses.  
\* P. 147.

To rein-

To make an estate.

To suffer  
one to take  
his goods.

goods out of the house, and when the party doth come or send to fetch them, the lessee doth only forbid them; this in this case is no breach of the condition, and it was agreed in this case that words without some deed, as shutting the door against them, forcible resistance, or laying of hands upon them, or the like, are

To suffer  
one to come  
into a house.

no breach of such a condition. And if a lease be made, on condition that the lessor shall be four times a year in the house demised, without being ousted by the lessee, and the lessee, seeing him coming, doth shut the door or windows against him; this hath been thought to be no breach of this condition.

To pay a  
yearly rent  
or sum.

If a lease be made, on condition that the lessee shall pay yearly to the lessor during the term ten pounds; in this case if he fail of payment once, the condition is broken, and estate forfeit. So if one make a feoffment in fee of land, on condition to pay ten pounds yearly to I. S. if he fail once the condition is broken.

Not to mo-  
lest copy-  
holders.

If a lease be made of a manor in which are divers copyholders, on condition that the lessee shall not molest, vex, or put out any copyholder paying his duties and services, in this case if the lessee enter upon, and put out any one copyholder, this is a breach of the condition. But if he enter *vi & armis* upon a copyholders tenements, and there beat him only, or the like; this is no breach of the condition.

To pay rent.

If there be a condition to pay rent, and the lessee let part of the land to other undertenants, or let all the land to another for part of the time; and he undertake the rent still, and fail of payment; in this case the condition is broken, and the estate forfeit. But if there be any covin and practice in the case, between the first lessor, and the lessee, the undertenants may perhaps have relief in equity (1).

Not to dis-  
turb.

If one make a lease for years of land, and then also make a feoffment in fee of the lands, on condition that if the lessee be disturbed in his term that he shall have the fee simple, and he is disturbed by the feoffor or by his means; in this case the condition is broken, and the lessee shall have the fee simple. But if the disturbance be by a stranger, and not by the feoffor, or by his means, or consent; this is no breach of the condition.

Not to be  
outlawed.

If a lease be made, on condition that the lessee shall not be outlawed, and he is outlawed without proclamation; it seems this is no breach of the condition, because the outlawry is not good.

If a condition possible at the time of creation, become after impossible in part by the act of God, and the party do not perform that which is possible, the condition is broken (2).

If a man make a lease for years on condition, and the lessee doth not know of it, and after the lessor doth by will give the land to the lessee without condition, and the lessee doth such

(1) Covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognizable in equity; and matters of fraud were one of the chief branches to which the jurisdiction of chancery was originally confined. 4 Inst. 84.—Bac. Abr. Fraud (B). Equity will give relief, though it is agreed that no relief shall be prayed in equity. 1 Mod. 305.—See fully in what cases relief may be had in equity. Com. Dig. Chancery (3 F.) Vin. Abr. Chancery (N.) 2 Atk. 306. 1 Ves. 95. 126. 387.

(2) See Ante 130. note 2.

Doct. &  
Stud. 35.  
13 H. 4. 17

Lit. Sect.  
353.  
Plow. 30.

21 Ed. 3. 7  
8 H. 6. 24.  
Dier 369.

Lit. Sect.  
383.

Co. 2. 15. 8.  
44. super  
Lit. 233.

Lit. Sect.  
352.

Co. 2. 59.

Co. 8. 94.

(1) There

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Abr. Condit

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(5) See a



an act as is a breach of the condition; in this case the condition is not broken, for the lessee must have notice of the condition ere he can break it.

Doct. &  
Stud. 35.

13 H. 4. 17.

If a lease be made rendering rent, on condition, that if the rent be not paid within twenty days the lessor shall re-enter, and

the rent is not paid; in this case the condition is broken, but the lessor cannot enter until he hath made a legal demand, and if he die before he do it, his heir shall never take advantage of that breach, but it is discharged for ever (1).

Lit. Sect.

353.

Flow. 30.

When an act is to be done in time convenient, or otherwise, and the party do it not by the time appointed by law; the condition is broken.

21 Ed. 3. 7.

8 H. 6. 24.

Dier 369.

If one grant an annuity *pro consilio impenso & impendendo*, and the grantor require advise, and the grantee refuse or neglect to

give it; this is a breach of the condition, and a forfeiture of the

estate. And if the deed be, that he shall go to such a place to

give counsel, and he require him to go thither, and he refuse it,

this is a forfeiture of the estate. But if he refuse to go with him

to another place, or give counsel to his adversary, being not re-

quired to give counsel to him, this is no breach of the condition

nor forfeiture of his annuity. And if one had heretofore devised

his land to be sold by his executors, and to have been distributed

for his soul, and the executors had not sold it in time convenient,

or had taken the profits to their own use; this had been a breach

of the condition (2). See more in the last foregoing division, and

in *obligation numb. 10. covenant numb. 7.* The same law is for the

most part of conditions of obligations. See *obligation numb. 10.*

Co. 2. 15. 8.

44. super

Lit. 233.

Every particular estate hath a condition in law annexed to it:

and therefore if tenant for life in dower, by the courtesy, or in tail

after possibility of issue extinct, lessee for years, tenant by statute

merchant, elegit, or the like, make any absolute or conditional

estate of the lands they hold, in fee simple, fee tail, or for life,

and give livery of seisin thereupon, or levy a fine *Sur consueance de*

*droit*, or suffer a recovery of the land, \* or the like; this is a

breach of the condition in law and a forfeiture of their estate (3).

Also if any such tenant (except tenant in tail after possibility of issue

extinct) (4) do waste in the lands they do so hold; this is a breach

of the condition in law, and a forfeiture of their estate in so much

as the waste is committed (5). But if an infant, or feme covert,

that hath such an estate, shall make any such estate, &c. this is no

To pay  
rent.

*The Rector of  
Rectories occur  
the St. A. 1502.*

*28 s. 2. which  
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with any  
Demand of the  
for Recovery of  
Bac. Abr.  
359. Cromp.  
2<sup>d</sup> 607. 173.*

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Bac. Abr.  
359. Cromp.  
2<sup>d</sup> 607. 173.*

breach of the condition in law. And yet if such a person do waste this is a breach of the condition in law. And so also if any such person be an officer, and do any thing which is a cause of forfeiture in another; this will be a forfeiture in him or her also.

If any keeper of a park, without warrant, kill any deer, fell or cut any wood, and convert it to his own use, pull down the lodge, or any house within the park, used for hay for the deer, or the like; this is a breach of the condition in law. So also if a keeper shall not look to the game, but the deer be killed by his default, and damage come to the Lord; by this also the condition is broken. But the not attending upon such an office for two or three days, if the Lord have no special loss thereby, is not cause of forfeiture.

Offices that are for the administration of justice, or of clerkship in any Court of Record, or concerning the King's treasure, revenue, account, alnage, auditorship, &c. have also conditions in law annexed to them; and therefore if such officers shall sell their offices or misdemean themselves in their offices, by this the condition in law may be broken, and they may forfeit them (1).

12. Who may enter for a condition broken; and what persons shall take advantage of a condition or a limitation; and what not.

As no man may create or annex a condition to an estate but he that doth create the estate itself, so neither can a man give or reserve the power, title or benefit of re-entry and avoidance of an estate upon the breach of a condition to any other but to him, or them, or at least to one of them that doth make the estate, his or their heirs, executors and administrators, &c. for it is a rule of the common law, that none may take advantage of a condition but parties and privies in right and representation, as heirs, executors, &c. of natural persons, and the successors of politique persons: and that neither privies nor assignees in law, as Lords by escheat, nor in deed, as grantees of reversions, nor privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition (2). And therefore if a man had made a lease for a life reserving rent, on condition that if the rent be behind, the lessor, his heirs and assigns shall re-enter; and after had granted the reversion to a stranger; this grantee should not by the common law have had benefit by this condition. But if the lessor had died, his heir, or the guardian in chivalry or socage of such an heir, if he had been an infant \* and in ward, might have taken advantage by the condition. And if one had been possessed of a lease for years, and had granted his term upon condition, and had died; his executors or administrators might have had advantage of this condition.

And at this day the law is still the same as touching privies in blood; for an heir shall take advantage of a condition, though no estate descend to him from the ancestor (3). And therefore if one be seized of land of the part of his mother, and he make a feoffment in fee of it on condition, and die, and the condition is broken; in this case the heir of the part of the father shall enter; but as soon as he hath entred, the heir of the part of the mother

(1) See further as to what shall be deemed a breach of a condition in law, *Cem. Dig.* Condition (8.)

(2) An entry by a stranger without authority is good, if it be assented to afterwards, and will support an estate, if the assent be before the demise in the declaration. See the case of *Fisbet v. Adams*, *Sir.* 1128.

(3) Equity will relieve against an entry made by heir at law, for the breach of a condition. *Cha. Rep.* 85. *Underwood v. Swain*.

shall enter upon him and enjoy the land. And if a man be seised of land in the right of his wife, and he make a feoffment in fee of it upon condition, and die; the heir of the husband shall enter for the condition broken, but the wife shall have the land. And so also is the law as touching privies in right and representation; for executors and administrators shall take advantage of a condition now as heretofore. And so also shall the successors of a Dean and Chapter, Bishop, Arch-deacon, Parson, Prebend, or any body politique or corporate, ecclesiastical or temporal; these shall take advantage of conditions as heretofore they did. So also the law is the same as touching privies in law; for they shall no more take advantage of a condition now than heretofore. But as touching grantees of reversions, and privies in estate, there is some alteration made of the law; for by a new law it is provided, that all persons which shall have any grant of the King of any reversion, &c. of any lands, &c. which appertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors and assigns, shall have like advantage against the feoffees, &c. by entry for nonpayment of rent, or for doing waste, or for other forfeiture, &c. as the said lessors or grantors themselves ought or might have had (1).

And for the true understanding of the sense of this statute and the ancient common law further touching this point, 1. These diversities must be observed to be taken, before the statute will take place still.

1. Between a condition that doth require a re entry, and a limitation that doth *ipso facto* determine the estate without entry; for albeit a stranger might not take advantage of the first, yet he might take advantage of the last, by the common law. And therefore if a man at this day make a lease to another *quousque*, or until *I. S.* come from *Rome*, or if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease to a \* widow *si tamdiu in pura viduitate viveret*, or if a man make a \* P. 151. lease to another for one hundred years if he live so long, and then the lessor doth grant the reversion to a stranger; in all these, and such like cases, the grantee of the reversion may take advantage of the limitation; for after the estate is ended by the limitation he may enter.

2. Between a condition annexed to a freehold, and a condition annexed to a lease for years; for if before the statute a man had made a gift in tail, or lease for life, on condition that if the donee, or lessee, did not pay ten pounds by such a day, the gift, or lease, should be void, or cease; in this case the grantee of the reversion could not by the common law have taken advantage of the condition; for it could not be void, or cease, but by entry, which could not be transferred to another. But if a lease for years had been made on such a condition; a grantee of the reversion might by the common law have taken advantage of this condition, for the estate in this case was by the breach of the condition *ipso facto*

(1) See more amply what persons may by force of this statute of 32 H. 8. c. 34. take advantage of a condition broken, in *Co. Lit.* 215. *Crs. Eliz.* 832. 5 *Co.* 112. b. 2 *Leon* 33. *Vin Abr.* Covenant 3. *Cem. Dig.* Condition (O. 2)



void, without entry. But now the grantee of the reversion shall have advantage of the condition in both these cases (1).

3 Between a condition in deed, and a condition in law; for by Co. super the common law not only the grantee of the reversion, but also the Lord by escheat, may either of them have advantage of a condition in law for any breach in his own time.

2. These resolutions and judgements upon the statute must be marked. 1. That the statute, is general, and the grantee of the reversion of every common person, as well as the King, may take advantage of conditions. 2. That the statute doth extend to grants made to the successor of the King, as well as to the King, albeit he only be named in the statute. 3. That he that comes to the reversion by fine, feoffment, grant, limitation of use, common recovery, or bargain and sale, is such a grantee as is within the indentment of the statute. 4. That where the statute doth speak of feoffees, &c. it doth not extend to gifts in tail; and therefore if a gift in tail be upon condition, and after the donor doth grant the reversion; this grantee shall never have any benefit of this condition. 5. That where the statute doth speak of grantees and assignees of the reversion, hereby an assignee of part of the state of the reversion may take advantage of the condition; as if lessee for life be, and the reversion is granted for life, &c. or if lessee for years be, &c. and the reversion is granted for years, &c. in these cases, the grantees of the reversion shall have advantage of the conditions.

† So if a lessee for one hundred years make a lease for ten years, rendering rent, with condition of re-entry, and the first lessee doth afterwards grant his term and estate to I. S. in this case, I. S. is such a grantee, and assignee of the reversion, as shall take advantage of the condition. 6. That as well mediate, as immediate, grantees, i. e. the grantees of grantees in infinitum, are intended within this statute. 7. That a grantee of part of the reversion cannot take advantage of a condition by this statute. And therefore if a lease be made of three acres, reserving rent, upon condition, and the reversion is granted of two of the three acres; in this case the rent shall be apportioned, but the condition is destroyed, except it be in the King's case. And yet a condition may be apportioned by the act of law, or by the wrong of the lessee (2).

As if a lease be made of two acres (the one of the nature of burrough English, and the other common law) upon condition, and the lessor having issue two sons, dieth, in this case, each of them shall enter for the condition broken. And if the lessee upon condition make a feoffment of part of the land; this doth not destroy the condition. There is therefore herein a difference between a condition that is compulsory, and a power of revocation that is voluntary: for he that hath such a power may by his own act extinguish it in part, by levying a fine of part of the land or otherwise, and yet his power may remain for the residue as in the case of a limitation; but in the case of a condition he cannot do so: 8. Such grantees as shall have advantage by this statute, must be compleat grantees; and therefore grantees of reversions by fine, or deed, must have attornment ere they can take advantage of the

(1) See accordingly and further *Vin. Abr.* Condition (N. d.) pl. 10.

(2) See accordingly, *Dyer* 308.

contin

\* P. 152.

Prerogative.  
Apportionment.

Power of revocation.

Co. super  
Lit. 214.  
Palsche 7.  
Jac. Co. B.  
per a Justices.

Co. super  
Lit. 215.  
Dier 309.  
Curia in  
Leek's case.  
Palsche 7.  
Jac. Co. B.

† Davy  
Mathew's  
case per  
2 justices  
Trin. 14.  
Jac. B. R.  
Co. 5. 114.  
113.  
Co. super  
Lit. 214.

per Justice  
Bridgman.

Doct. & St.  
35. 13 H. 4. o  
17.

Perk. Sect.  
34.

(1) For the  
statutes of 4 A.  
(2) See before

condition. And yet if a reversion be granted by fine to one that hath no attornment, and he grant it to another that hath an attornment; in this case the second grantee shall take advantage of the condition, albeit the first grantee shall not (1). And the lessee must have notice of the grant of the reversion, ere he in reversion can take any advantage of a condition. And therefore it is, that if the lessor bargain and sell the land by deed indented and inrolled (in which case there needs no attornment); or if the lessor make a feoffment of the land, and so oust the lessee, and the lessee re-enter (which is an attornment in law); the grantee, or feoffee, in these cases, cannot take advantage of any condition, before he hath given notice to the lessee of this grant of the reversion.

9. Such as come in merely by act of law, or paramount, as the Lord of a villain, the Lord by escheat, the Lord that doth enter for mortmain, or the like, cannot take advantage of a condition within this statute. And hence it seems it is, that if lessee for forty years make a lease for thirty seven years on condition, and after surrender his estate to his lessor; that the surrenderee shall not have advantage of this condition. 10. † Albeit the words of the statute be general, yet grantees and assignees shall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but only of such as are inherent, \* i. e. such as are either incident to the reversion, as for payment of rent, or for the benefit of the state, as for restraining of waste, for causing of reparations, making of fences, skowring of ditches, preserving of woods, and the like. And of conditions that are collateral such grantees shall not take benefit. And therefore if the condition be for payment of a sum of money in gross, to restrain alienation, for the delivery of corn, wood, or the like, the grantee of the reversion of the land shall not have advantage of it by this statute; for these remain as they were before the statute, at the common law. 11. Such conditions as are on the part of the lessor, it seems are not within this statute; and therefore if one make a lease for years, on condition that if the lessor, his heirs or assigns, pay ten pounds to the lessee at Lady-day, the lease to be void, and the lessor doth grant the reversion to a stranger before the day; it seems the grantee shall not take advantage of this; but the condition is gone.

If one make a lease for years rendring rent to him and his heirs, on condition that if it be not paid within fourteen days, that he and his heirs shall re-enter, and the rent is behind, and the lessor doth demand it, and then die; in this case the heir may enter. But if he die before demand, the heir cannot make a demand, and so take advantage of that breach of the condition, which was in the time of his ancestor (2).

If a man be possessed of land for twenty years in the right of his wife, and he make a lease of it for ten years rendring rent, with condition of re entry for default of payment, and after the husband die; in this case, the wife shall have the rent, but it seems she shall not take advantage of the condition.

*Widd. v. Ruffell*  
*3 F.R. 492*  
*4 Bosc. Ab. 214.*  
*See Hunt 207*

\* P. 153.

(1) For the doctrine of attornment, see chapter 13. post.—Attornment is rendered unnecessary by the statutes of 4 Ann. c. 16. § 9. and 11 Geo. 2. c. 19. § 11.

(2) See before in page 145.

If a lease be made to *I. S.* on condition that if such a thing be, *Co. 1. 84.*  
or be not done, that the land shall remain to *I. D.* or that *I. D.* <sup>super Lit.</sup>  
shall enter; in this case *I. D.* shall never take advantage of this <sup>379. Dier</sup>  
condition, either by the common law, or by this Statute. <sup>127. 117.</sup>

13. Where  
entry or  
claim is  
needfull to  
avoid an es-  
tate on con-  
dition; and  
where a man  
may take  
advantage of  
a condition  
without en-  
try, or claim;  
and where  
not.

Regularly where a man will take advantage of a condition, if *Co. super*  
he may enter, he must enter, and when he cannot enter, he must <sup>Lit. 218.</sup>  
make a claim; for an estate of freehold or inheritance will not <sup>237.</sup>

cease without entry or claim (1). And he that is to have advan-  
tage by the condition, may waive his advantage if he will. And  
until such entry or claim made, the party that should enter can  
make no good estate of the thing to any other. But herein a dif-  
ference is to be observed in the penning of a condition, between a  
lease for years, and a lease for life, or a greater estate: for if a  
lease for years be made, on condition that upon such a contingent  
the estate shall cease, or the lease shall be void; in this case  
when the thing doth happen, the lease is *ipso facto* void without  
entry or claim. But otherwise it is of a lease for life, albeit there

• P. 154. be the same words in the condition. And if one make a lease  
for years, on condition that if such a thing be done, the lessor shall  
re-enter; in this case an entry is needful to avoid the estate (2).

If one make a feoffment in fee, gift in tail, or lease for life,  
on condition that upon such a contingent the estate shall be void;  
in this case there must be an entry made, after the condition is  
broken, to avoid the estate. So if one bargain and sell his land  
by deed indented and inrolled, with proviso that if the bargainor  
pay, &c. then the estate shall cease and be void, and he doth pay  
the money; in this case the estate is not re-vested in the bargainor,  
before an actual re-entry is made. And so it is also if lands be  
devised to a man and his heirs, on condition that if the devisee do  
not pay twenty pounds at a day, his estate shall cease and be  
void; in this case the estate is not void until an actual re-entry  
be made. And so also it is if a reversion, remainder, advowson,  
rent, common, or the like, be devised on such a condition; in  
these cases there must be a claim, before the estate will be deter-  
mined. And therefore if a man grant such a thing to another  
and his heirs, on condition that if the grantor pay twenty pounds  
on such a day, the estate of the grantee shall cease or be void,  
and the grantor doth pay the money according to the condition;  
in this case the estate is not re-vested in the grantor before a  
claim made at the church in case of an advowson, and in other  
cases upon the land. But in case where a man cannot make an  
entry or claim, there the law will not compel him to it. And  
therefore if one grant land to another for five years, on condi-  
tion that if he pay to the grantor within the two first years forty  
marks, that then he shall have the fee, otherwise but for term  
of five years, and livery of seisin is made accordingly, and the  
grantee doth not pay this money; in this case after the two years

because the  
bargainor must  
be in at  
common law  
his queue

Co. 4. 120.  
Perk. Sect.  
840. Plow.  
156. 482.  
14 H. 8. 17.

Co. super  
Lit. 234.  
Perk. Sect.  
843. 844.  
Co. super  
Lit. 233.

Crompt. Jur.  
Jur. 64. 65.

(1) Entry by a legal owner, is a notorious act of ownership, and equivalent to a feodal investiture by the lord, and gives the owner seisin, and makes him compleat owner of the estate and capable of conveying it from himself, either by descent or purchase. See further, as to the nature and manner of making entry and claim, *Co. Lit.* 15. 254. b. 3 *Bl. Com.* 175. 4 vol. 147.

(2) No one can enter for a condition broken as bailiff to another, without the special command of him to whom he is bailiff. *M. 52.*

(1) Regu-  
but that fa-  
tion (O. C.)



are past, the freehold shall be in the grantor without entry or claim; for as this case is, he cannot enter, but he must oust the lessee of his term. So if I grant a rent charge out of my land upon condition; when the condition is broken, the rent is extinct, and there needs no claim. So if a man make a feoffment of land to me in fee, on condition that I shall pay him twenty pounds such a day, &c. and before the day I let the land to him for years, rendering rent; and after, the condition is broken; in this case he may retain the land without entry or claim, and the rent is extinct. So if one covenant to stand seised to the use of himself for life, or otherwise, and then after to the use of others, with a proviso of revocation, &c. and after, he doth revoke it; in this case all the estates are re-vested in him without entry or claim.

*See v. Perkins.  
12 or 13, 2nd  
not underlined*

It is generally true, that he that doth enter for a condition broken, doth make the estate void *ab initio*, and that he shall be in of his first estate in the same course and manner as it was when he departed with the possession, and at the time of the making of the condition (1). And hence it is, that if there be any charge or incumbrance on the land, as if lessee of land upon condition grant a rent-charge out of the land, or enter into a statute, or recognisance, and the conusee have the land in execution, and this charge is after the condition is made; in this case, when the condition is broken, and the party doth re-enter, he shall by relation avoid the rent, statute, and recognisances, and hold the land freed from them all. And if an estate be to pass by way of increase, upon condition; or a lease is to be made upon a condition precedent; when the condition is performed, the party shall hold his estate free from all after charges and clogs. And if a man enter for breach of a condition in law, he shall avoid all charges, and acts done after that thing is done, which doth produce the forfeiture; but he shall not avoid any thing done before that time; for he must take the thing as he finds it: as if a house, or land, belong to an officer, in respect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this case the rent shall continue. And if lessee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this case the rent shall continue, and the lessor cannot avoid. But if lessee for life of land make a feoffment in fee of it, and then grant a rent out of the land; in this case the lessor shall avoid it. And if a lessee grant a rent out of his land, and then do waste, and the lessor recover the land, he cannot avoid this rent, but shall hold the land charged with it. But if the lessee do waste first, and then he grant a rent-charge to a stranger out of the land, and after the lessor recover the place wasted; in this case he shall hold the land discharged. And if lessee for life make a lease for years, and after enter upon the lessee for years, and make a feoffment in fee; this shall not avoid the lease for years. And if a man make a lease for years, rendering rent, with clause of entry for non payment, and the lessee doth make underleases of part of this land, and after the rent is unpaid, and the lessor

\* P. 155.

14. When a condition broken shall make the estate, &c. void, *ab initio*. And when not. And to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate. And to what intents not.

*quon*

Crompt. Jur. And if a man make a lease for years, rendering rent, with clause of entry for non payment, and the lessee doth make underleases of part of this land, and after the rent is unpaid, and the lessor

(1) Regularly it is true, that he that entereth for a condition broken shall be seised of his first estate; but that faileth in many cases: for the instances, in *Co. Lit.* 202. a. See further in *Com. Dig.* Condition (O. c.) *Vin. Abr.* Condition (P. d.)

Equity.

doth enter; in this case he shall have all the land, and avoid all the under leases. But if there be any covinous practise in the case, the undertenants may have remedy in equity. And if a lease be made for life, the remainder in tail, on condition; in this case if the condition be broken, both the estates be avoided. *Et sic de similibus.* But this general rule doth fail in divers particulars: as if a man be seised of land in the right of his wife, and he maketh a feoffment in fee by deed indented, upon condition that the feoffee shall devise the land to the feoffor for life, &c. and the husband dieth, and then the condition is broken; in this case the heir of the husband shall enter, and yet he shall not have the estate of the feoffor, for this doth presently after his entry vanish away.

\* P. 156. So if a tenant in special tail hath issue, and his wife dieth, and tenant in tail maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, and then the feoffor doth re-enter; in this case, he shall have but an estate for life, as tenant in tail after possibility of issue extinct. So if a lessee for life, or years, make a feoffment in fee on condition, and after doth enter for the condition broken; in this case he shall not be in the same course, for now his estate is subject to entry for forfeiture, though he be tenant for life still. So if a disseisor be of certain land, and he die seised thereof, and his heir is in by descent, and the disseisee enter upon the heir, and infeoff a stranger upon condition, and the heir of the disseisor doth enter upon the feoffee, and the disseisee doth sue a writ of entry *sur disseisin* against the heir of the disseisor, and doth recover and hath execution, and the feoffee on condition doth re-enter and after the condition is broken; in this case the feoffor is not in in the same case; for now the disseisor cannot enter upon him, as he might before. And in some cases the feoffor by his re-entry shall be in in his former estate, but not in respect of some collateral qualities: as if tenant by homage ancestrel, make a feoffment of the land he doth so hold, in fee, on condition, and entreth for the condition broken; in this case, it shall never be held in homage ancestrel again. And so if a copyhold escheat be, and the Lord make a feoffment in fee upon condition, and entreth for the condition broken; in this case the custom annexed to that land is gone. So if there be Lord and tenant by fealty and rent, and the Lord is in seisin of the rent, and granteth his seignior to another and his heirs, on condition, and the tenant doth attorn and payeth his rent to the grantee, and the condition is broken; the Lord distraineth for his rent, and recous is made; in this case the former seisin shall not enable him to have an assise without new seisin. If there be Lord and tenant, and the Lord disseise the tenant of the tenancy, and therefore doth infeoff a stranger on condition, and after the condition is broken, and the Lord enter, and the tenant doth enter upon him; in this case the seignior is not revived.

If tenant in tail make a feoffment in fee, on condition, and dieth, and the issue in tail within age doth enter for the condition broken; in this case he shall be in first as tenant in fee-simple, and heir to his father, and then shall be presently re-mitted:

Co. super  
Lit. 202,  
203.Co. super  
Lit. 202.  
Perk. Sect.  
242, 842,  
843.Co. super  
Lit. 207.  
119. 15 H.  
7. 13. Dier  
262.Perk. Sect.  
819.Co. super  
Lit. 215.  
Co. 4. 120.

(1) Because  
own act. C  
disable, and  
restored and  
the doctrine  
(2) See fu  
(3) See a  
(4) And i  
condition, y

mitted: but if he be of full age he shall not be remitted (1).

If one make a feoffment of white acre, and black acre, on condition, &c. and that he shall enter into black acre only; in this case upon breach of the condition, he shall enter into that part only.

If the words of a condition be, that if such a thing be not done, the feoffor or lessor shall enter into the land, and take the profits thereof until the thing be done, or to the like effect; in this case \* if the feoffor, or lessor, enter upon the breach of the condition, \* P. 157. he doth not avoid the estate, or get any thing by his entry, but the possession only in the nature of a pledge, or a distress, until the thing be done; and if the condition be for the payment of the rent, he shall hold the land until he be paid the rent. And if the words be [that the feoffor, &c. shall enter and take the profits, until thereof he be satisfied, or until he be satisfied or paid the rent] in the first case as soon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the last case as soon as he is paid the rent by the feoffee or lessee, the feoffee or lessee may enter again into the land (2).

If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone for ever, and the estate is absolute (3). As if a feoffment be made to me, on condition that I shall reinfest the feoffor before a day, or on condition that I shall appear at *Westminster* in the King's Bench such a day, or on condition that I shall go to *Paris* about the affairs of the feoffor before such a day, and before the day appointed it doth happen that I die; in all these cases the condition is discharged. So if the condition of a feoffment be, that if the feoffor, or his heirs, pay ten pounds to the feoffee such a day, and before the day the feoffor dieth without heir; in this case the condition is gone. And if the condition become impossible in part only, then it is discharged for so much only (4).

If there be Lord and tenant, and the tenant doth enfeoff a stranger on condition, and the feoffee die without heir, so that the tenancy escheat; in this case the condition doth continue, and the Lord must hold it subject to the condition.

Albeit a condition cannot be divided by the act of the parties, but it will be destroyed, yet it may be divided by the act of law; and therefore if a lease for years be made of two acres of land (the one of the nature of Burrough English, and the other at the common law) on condition, and the lessor having issue two sons dieth; in this case albeit the condition be divided, yet it is not gone, but doth continue still, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reversion, grant part of his reversion to a stranger; the condition is destroyed in all, for it cannot be apportioned by the act of the

15. When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time: or not.  
1. By the act of God. Conditions impossible.

2. By the act of law.

*Don Bacon*  
27th Feb. 1699

(1) Because he might have had his formdon against the feoffee, and the entry for the condition is his own act. *Co. Lit.* 202. b. Remitter is an operation of law, upon the meeting of an ancient right remediable, and of a latter state, in one person, where there is no folly in him, whereby the ancient right is restored and set up again, and the new defeasible estate cleared and vanished away. *Co. Lit.* 347. b. For the doctrine of Remitter, see 3 *Bl. Com.* 19. 189. and fully in *Com. Dig.* and *Vin. Abr.* tit. Remitter.

(2) See further what act destroys a condition, *Com. Dig.* Condition (Q).

(3) See accordingly *Co. Lit.* 206. a.—*Roll. Abr.* 449. 2 *Leon.* 155.

(4) And if the condition consists of two parts, one of which was impossible at the time of making the condition, yet it is a good condition, and the other ought to be performed, *Cro. Eliz.* 780.



3. By the  
act of the  
parties.

many

\* P. 158.

parties, as it may by the act of the law or the wrong of the lessee (1).

A condition may be destroyed in the very creation of it; as if one devise lands for life, with express words of a condition, and not words of limitation, or words that may be so taken, the remainder over to a stranger; in this case the stranger cannot enter, neither is the remainder good, nor the condition effectual. Or it may be discharged, by matter *ex post facto*: as in the examples following.

\* If one make a feoffment in fee of land, upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguish the condition. And if a fine in this case be levied in pursuance of a former agreement; as if one by indenture bargain and sell his land to another, and in the indenture there is a covenant that all other assurances shall be to the use of the bargainee, according to the first agreement, and the bargain and sale hath a condition annexed, that the bargainee shall make a feoffment of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the first bargain: in this case the condition is not extinct, but saved by the original agreement. And if one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make a lease for years only of the land, or part of it, to the feoffee or any other; by this the condition is suspended for that time. And if the feoffor, after a feoffment made of land upon condition, enter upon all or part of the land, and be impleaded, and lose it; by this the condition is gone for ever. And if he enter and hold the possession only; by this the condition is suspended during his possession; and if he hold the possession so long that the feoffee cannot perform the condition; the condition is discharged for ever. And if one make a feoffment of land upon condition, and after, and before the condition broken, the feoffee doth make a feoffment of all or part of the land, to the feoffor; by this the condition is gone for ever. And if the feoffee make a lease for life, or years only, of part of the land; by this the condition is suspended for that time. But if the feoffee make a feoffment in fee, lease for life, or years to a stranger; this is no extinguishment nor suspension of the condition. And if the condition be to pay money, or do any such collateral thing; if in this case the feoffee make a lease to the feoffor, this doth not suspend the condition.

Release.

If the feoffor, or lessor, release to the feoffee, or lessee, all conditions, or all demands in the land, or confirm the estate of the feoffee without condition, &c. by either of these means the condition is destroyed and gone for ever.

If one make a lease for life, or years, of land on condition, and after grant the reversion of part of this land; hereby the

(1) See fully in what cases the non-performance of a condition shall be excused by the Act of God, or by Act of Law.—*Com. Dig.* Condition (L. 12.) *Bac. Abr.* Condition (Q.) *Vin. Abr.* Condition (G. c.)<sup>12</sup> (K. c.)

condition

Perk. Sect.  
763. 765.  
764.

Co. 4. 119. 5.  
32. 2. 39.  
714. Dier  
309.

Perk. Sect.  
766.

Perk. Sect.  
812.

Co. 2. 59.  
Perk. Sect.  
819. 820.  
163. Lit.  
Bro. Sect.  
212 Co.  
super Lit.  
219.

Co. 7. 14. 4.  
52. Lit.  
Bro. Sect.  
212. 85.  
Co super  
Lit. 218.

Perk. Sect.  
823. Co. 1.  
147. See  
Release and  
confirmation.  
Co. 2. 59.  
Perk. Sect.  
163. Co. 4.  
119.

Co. 3. 64.  
super Lit.  
211.

Lit. Sect.  
476. 477.  
Co. super  
Lit. 277.

(1) See m  
Condition (Q)

condition is destroyed for ever. And if he make a lease of part of it only; by this the condition is suspended.

Perk. Sect.  
763. 765.  
764.

A condition may be extinct, or suspended, by the intermarriage of the parties to the condition; as if a feoffment be made by a woman, on condition to pay ten pounds, or on condition to infeof her by a day certain, and before the day they two do intermarry, and the marriage doth continue until after the day; in this case the condition is gone. And if the condition be to re enter for not payment of rent; the condition shall be suspended, and no rent be paid during the coverture.

P. 159.

Co. 4. 119. 5.  
32. 2. 39.  
714. Dier  
329.

If a lease be made for years, on condition that the lessee or his assigns shall not alien without the licence of the lessor, and the lessor licence the lessee alone to alien, or licence him to alien a part of the land, or licence him to alien all the land for a time; or if the lease be to three on such a condition, and the lessor licence one of them to alien; in all these cases, the condition is gone for ever.

Perk. Sect.  
766.

If one had enfeoffed me, on condition that I should pay him ten pounds at Easter, and before the time he had entred into religion, and made me his executor, and had not been dearraigned; in this case the condition had been gone for ever.

Perk. Sect.  
822.

If I be seised of land in fee, and take a wife, and during the marriage enfeof a stranger on condition, and die, and the feoffee endow my wife of her third part; in this case the condition is not destroyed, and yet the third part is freed from the condition, but the reversion of that third part is not freed from the condition. And if she grant her estate again to the feoffee, the condition is revived. So if there be Lord and tenant, and the tenant make a feoffment in fee upon condition, and the feoffee is attainted of felony, &c. so that the tenancy doth escheat; in this case the condition is not gone, but the tenancy is charged with it.

Co. 3. 64.  
super Lit.  
211.

If a feoffment or lease be made, rendring rent, on condition for non-payment a re-entry, and the feoffor, or lessor after the breach of the condition doth distrain, or bring an assise for the rent, or doth accept the rent at another day; hereby the condition is not destroyed, but it is discharged for that time; so that the feoffor, or lessor, cannot take any advantage of that breach: and if the act to be done by the condition be a collateral act, as not to alien, or the like, and the condition is broken, and the feoffor not having notice thereof, doth accept the rent; in this case also, and by this means, the condition is not discharged (1).

Lit. Sect.  
476. 477.  
Co. super  
Lit. 277.

If one disseise the feoffee, or the heir of the disseisor, or any other that hath lands by a just title, and thereof enfeof a stranger on condition, and the land is lawfully recovered from him, by him that hath the title; hereby the condition is destroyed for ever. And if a disseisor make a feoffment in fee, on condition, and after the disseisee doth enter upon the feoffee on condition; this doth extinguish the condition. But if the disseisee release to the feoffee on condition; this release doth not discharge the condition. But if a disseisor make a lease for life, and the lessee for life make a feoffment in fee on condition, and

4. By the act of a stranger.

(1) See more amply in what cases conditions shall be discharged by the act of the parties, *Bac. Abr.* Condition (Q. 3.) *Vin. Abr.* Condition (K. D.) *Com. Dig.* Condition (L. 4.)

\* P. 160. \* the disseisee release to the feoffee of the tenant for life, by this condition make a feoffment over, without condition, and the disseisee release to the second feoffee; by this the condition is destroyed, be the release before the condition broken, or after. And if feoffee on condition make a lease for life, and the feoffor release to the feoffee on condition, or lessee for life, all conditions, or all demands to the land; by this the condition is discharged. And if the feoffee on condition make a feoffment to another on condition, and after, the first feoffor doth enter for breach of the condition; hereby the second feoffment, and the condition also, is gone for ever. Perk. Sed. 823. 821.

If a man seised of land in fee, let it to a stranger for years, and one that hath no right doth oust the lessee, and thereof die seised, and his heir is in by descent, and he doth make a feoffment to a stranger upon condition, upon whom the lessee for years doth enter within the term, claiming his term; in this case the lessee shall hold the land discharged of the condition. Perk. Sed. 820.

And now we pass to a *covenant*, being another part of a deed.



C H A P. VII.

Of a Covenant.

Termes of  
the law. tit.  
Covenant.  
Plow. 308.

A Covenant is the agreement or consent of two or more by deed <sup>1. Covenant.</sup> in writing, sealed and delivered, whereby either or one of <sup>Quid.</sup> the parties doth promise to the other, that something is done already, or shall be done afterwards (1.). And he that makes the covenant is called the covenantor; and he to whom it is made, <sup>Covenant-</sup> the covenantee. <sup>tee.</sup>

Termes of  
the law. tit.  
Covenant.  
Co. 4. 80.  
5. 17. F. N. B.  
145. 146.  
Dier 338.

And this is either exprefs, or in deed, *i. e.* when the covenant <sup>2. Quatu-</sup> is expreffed in the deed: as when *A.* by deed doth covenant with *B.* to serve him for a year, and *B.* doth covenant with *A.* to pay him ten pounds for his service. Or it is implied, or in law, *i. e.* when the deed doth not exprefs it, but the law doth make and supply it. As, when one doth make a lease for years by the words [demise or grant] without any exprefs covenant for quiet enjoying; in this case the law doth intend and make such a covenant on the part of the lessor, which is, that the lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the lessor, and at least during the lessor's life, and (as some think) during the whole term; and hereupon an action of covenant may be brought against him in the reversion; so that if the heir that is in by descent, put out the termor of his father, the termor may have \* this action against him (2). A covenant is also either real, *i. e.* that whereby a man doth bind himself to pass a real thing, as lands or tenements; as a covenant to levy a fine of land, in which case the land itself is to be recovered; or when it doth run in the realty so with the land that he that hath the one, hath or is subject to the other, and so a warranty is called a real covenant. Or it is personal, *i. e.* when it doth run in the personality, and not with the land, but some person in particular shall have benefit by it, or be charged with it: as when a man doth covenant to do any personal thing, as build or repair a house, serve him, or the like (3). And these also are some of them said to be inherent, *i. e.* such as are conversant about the land; as that the thing demised shall be quietly enjoyed, shall be kept in reparations, shall not be aliened; or if it be to be sold, that the lessor shall have the first refusal; to pay rent, not to cut down timber trees, or do waste, to fence the coppices when they be new cut, to make further assurance, or the like. And some of them are said to be collateral, *i. e.* that are conversant about some collateral thing that doth no-

\* P. 161.

(1) A covenant is not a duty, nor cause of action, till it be broken; and therefore it is not discharged by a release of all actions: and when it is broken the action is not founded merely upon the speciality, as if it were a duty, but favours of trespass; and therefore an accord is a good plea to it; and ends in damages. *Allyn* 39.—See further as to the nature of a covenant, in *Gilb. Law of Covenants, chap. 1.* and *2 Bl. Com. 304.*

(2) Where the covenant is created by law, the covenantee cannot bring an action of covenant, if he be not ousted by one, who has a title; but it is otherwise in case of an exprefs covenant. *2 Brownl. 161.* The distinction between implied covenants by operation of law, and exprefs covenants, is, that exprefs covenants are taken more strictly *per* *Ld. Mansfield. 3 Burr. 1639.*

(3) What shall be a real, and what a personal covenant, see *Vin. Abr. (G. 2.) Bac. Abr. Covenant (2.) Cam. Dig. Covenant (A. 2.) Gilb. Law of Covenants 105.*

thing

thing at all, or not so immediately, concern the thing granted; as to pay a sum of money in gross, to build a house in another man's ground, to make a feoffment or lease of other land, to give other security to perform the covenants, or to pay the rent, or that the lessor shall distrain for the rent in some other land than that which is demised, or the like; these are collateral covenants (1). There is also a covenant to stand seised of land to uses, which is now become a kind of conveyance of land; for which read *uses* at large (2).

3. The use and operation of it.

A writ or action of covenant. *Quid.*

Use.

Lease.

Contract.

\* P. 162.

4. What shall be said a good covenant in a deed, upon which an action of covenant may be had: and what not.

1. In respect of the manner of making it.

The most frequent use of a covenant is to bind a man to do something *in futuro*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may have thereupon for his relief an action, or writ of covenant, against the covenantor, so often as there is any breach of the covenant (3). And this writ of covenant is therefore defined to be a writ lying where a man is bound by a covenant in a deed, and hath broken it. And in this case commonly the party damnified shall recover damages only for the breach; and if he have a judgement in an action brought for one breach, and after the covenantor doth break the covenant again; in this case he may bring a new action, and so for every breach. But a covenant doth sometimes also make a transmutation of a property and possession of things, as in case of a covenant to stand seised of land to uses, for which see *Use*. And in case where one doth covenant that another shall have a piece of land for five years; this is a good lease for five years, for which see *lease*. And in case where one doth covenant with another, that if he pay him ten pounds such a day, he shall have all his cattle in *Dale*, or his lease for years he hath of the manor of \* *Dale*; in this case it seems if he pay the money at the time he shall have the property of the goods, and of the lease for years. It is said therefore that in some cases upon the writ of covenant the party shall recover the land itself out of which he hath been ejected.

A covenant may be in the affirmative, or in the negative (4). And it may be executed, *i. e.* that a thing is done already; or executory, *i. e.* that a thing shall be done hereafter; and these are all good. But if it be of a thing present, as if I covenant that my horse is yours; this is void. \* And these covenants being made by a deed poll are as good and effectual, as when they are made by a deed indented, so as the party have the deed to shew; for otherwise a common person cannot have an action of covenant; for it doth not lie upon a verbal agreement, neither can it be grounded without a writing, except it be by a special custom, as in *London* (5). <sup>b</sup> And there needs not in this case formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant (6); for a covenant may be

(1) As to collateral covenants, see 4 *Burr.* 2446.—2 *Wils.* 27.

(2) See accordingly and further as to the different kinds of covenants, 1 *Wood* 354.

(3) It is a general rule in *equity*, that what is covenanted to be done, is considered as actually done, 3 *Atk.* 534.

(4) As to affirmative and negative covenants, see *Fin. Abr.* Covenant (D. a.) and 1 *Wood* 356.

(5) Or by the custom of any other place; tho' such custom shall be taken strictly. 1 *Leon* 2.

(6) Any words, which shew the parties concurrence to the performance of a future act, being effectual for that purpose. 1 *Leon* 324. 1 *Ch. Ca.* 294.—The word *covenant* is not necessary to make a covenant. 1 *Roll. Abr.* 518.—No particular technical words are requisite towards making a covenant. 1 *Burr.* 290. had

Co. 1. 154.  
Lit. Bro.  
Sect. 309.  
27 H. 8. 16.  
Plow. 308.  
F.N.B. 146.

Adjudged  
Paich. 14.  
Jac. B. R.  
Sir Thomas  
Bret versus  
Cumber-  
land's.

Bro. Cove-  
nant 21. 16.  
& Co. &  
Dier ubi  
supra.

Dier 150.  
Co. 1. 155.

Bro. cove-  
nant 38. de-  
cent 50  
H. 7. 32.

Perk. Sect.  
q.

See West.  
ymb. in  
his first part

to & in-  
a. Plow.  
308. 302.

H. 8. 16. se  
H. 7. 37.

13. 324.  
3. 251.  
Co.  
nant 1.

(1) And then  
amounts to a c  
acted the for  
1 *Roll. A.*  
(2) See more  
Br. Covenant

had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for any thing to be or not to be done, the party to or with whom the promise or agreement is made may have this action upon the breach of the agreement (1). And therefore if these words be inserted in a deed amongst other covenants [that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessor shall skowre ditches, provided always that the lessor do carry away the earth;] these are good covenants on both sides. And if a lease be made of houses by patent to *I. S.* for twenty one years, and therein is inserted this clause [and that the said *I. S.* and his assigns shall repair the houses when they shall be decayed;] this is a good covenant. And so also it is where these or the like words be inserted amongst other covenants [and that the lessee shall pay ten shillings a year rent, or that the lessee shall not alien;] these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing. As if in case of the rent there be a clause of distress, re-entry, or *nomine pene*. And in all cases regularly where words that do begin the sentence be conditional, and have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant, as in the cases of condition before. And yet if words of condition and words of covenant be coupled together in the same sentence, [as provided always, and it is covenanted, or the like;] in such cases the words may be construed to make a covenant and a condition both.

If a man make a lease for life by indenture, and therein are inserted these words [it is provided that if the lessee die within sixty years, that then his executors and assigns shall have the land until the sixty years be ended, to be accounted from the date of the indenture;] this albeit it be not a good lease, yet it is a good covenant.

If a man make a lease for years, and warrant it to the lessee, his heirs, and assigns, during the term; or he that hath right to the land confirm the estate of the lessee for years with warranty; in these cases, howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing.

If the Lord grant to his tenant, that he will not distrain him in such a part of his land for his rent; this shall be taken to be a good covenant, by this word [grant] (2).

A covenant to do any thing that for the substance and matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good: as if the grantor covenant that he is seised or possessed of a good estate of and in the thing he doth grant, and hath power to grant it. That the grantee shall quietly enjoy it. That it is and shall be free from incumbrances. That he will make further assurance if need be. That if the grantee be evicted, he shall

(1) And therefore if by articles of agreement it is said, that it is intended a fine shall be levied, this amounts to a covenant to levy it. 2 *Mod.* 91. So also in an indenture of apprenticeship, there are not needed the formal words of a covenant, but only an agreement that such things shall be done by the parties. 1 *Roll. Abr.* 519.—*Gilb. Covenant* 14.

(2) See more fully by what words an express covenant may be created, *Vin. Abr. Covenant* (C.) *Bac. Abr. Covenant* (A). *Gilb. chap.* 2.



pay no rent. That the grantee shall pay rent. That he shall discharge all dues, and save and keep harmless the grantor. That he shall not alien the thing granted; or, if he do, that the grantor shall have the first refusal thereof. That he shall not do waste. That he shall have houseboot, and hayboot. That the grantor or grantee shall repair the old housing, or build new. That he shall pay and discharge all rents and payments issuing out of the land. That he shall not fell trees; or, if he do, that he shall pay to the grantor so much in money for every tree. That if he fell any underwood, he shall fence it. That he shall make an estate of land. That he shall be quit of any suit, service, or payment. That he shall give sufficient security to *I. S.* for an hundred pounds he doth owe him; all these, and the like covenants, are good. And generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also. But if the matter required to be or not to be done by the covenant, be, for the substance thereof, unlawful, then is the covenant void, and doth not bind: and therefore if one covenant to kill or rob a man, or the like; this covenant is void. So if one covenant that he will maintain another in his suits, or that he will not appear in inquests, or that he will break the peace, or that he will forestall corn, or the like; these covenants are void. So if one be tenant in fee-simple of land, and he covenant that he will not alien it; this covenant is void. So if a man be a tradesman, and he covenant that he will not use or exercise his trade; this restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his trade at one time, or in one city or town only, \* this covenant may be good. So if a man be by covenant restrained to sow the land which hath been used to be sowed, and this be either absolutely, or *sub modo*, i. e. that if he sow it he shall pay thus much an acre for it; these covenants have been held to be void. *Sed quare* how the law is now, for it seems the statute of 39 *Eliz. ch. 2.* is discontinued (1). If *A.* owe money to *B.* and *B.* owe money to *C.* and *B.* doth make a letter of attorney to *C.* to sue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not release the debt to *A.* in this case albeit this be maintenance in *C.* to sue at his own charge, yet this is a good covenant, and not against law. So also if a Dean and Chapter, or the like, covenant to renew a lease contrary to the meaning of the statute of 18 *Eliz. ch. 11.* it seems this is a good covenant. And if the thing to be done by a covenant be in the nature of it impossible, the covenant is void. And therefore it is, that if a man covenant to go to *Rome* in three

Against law.

\* P. 164.

But this must be upon good consideration void. 10 *Wm.* 181.

Impossible.

(1) This act was for "the maintenance of husbandry and tillage." It enacted, that all land converted from tillage to pasture since the 17 Nov. 1 *Eliz.* having been used for tillage twelve years before the conversion, should be restored to tillage before the 1st of May 1599.—The act is not inserted in *Hovart's* *Rasshead's*, or *Pickering's* edition of the statutes, being marked to be expired, but it is contained in *Rassell's*.—The preamble is curious, and not unworthy attention—It recites that the strength and flourishing estate of this kingdom hath been always and is greatly upheld and advanced by the maintenance of the plough and tillage, being the occasion of the increase and multiplying of people, both for service in the wars, and in times of peace, being also a principal means that people are set on work, and thereby withdrawn from idleness, drunkenness, unlawful games, and all other lewd practices, and conditions of life, that by the same means of tillage and husbandry, the greater parts of the subjects are preserved from extreme poverty, in a competent estate of maintenance and means to live, and the wealth of the realm is kept dispersed, and distributed in many hands, where it is more ready to answer all necessary charges, for the service of the realm; and that husbandry and tillage is a cause that the realm doth more stand upon without depending upon foreign countries, either for bringing in of corn in time of scarcity, or for want of utterance of our own commodities being in over great abundance.

*Dunlop & Martin* 6 *Vol. An.* 328

See Condition Num. 7

Dier 19. 115

Mich. 36.

37 *Eliz.*

Co. B.

Adjudged

Deaux versus

Jessefferies

21 H. 7. 23.

Perk. Sect.

69.

Fitz. Covenant

nant 5.

Fitz. Covenant

nant 3.

Plow. 307,

308.

21 H. 7. 18.

27 H. 8. 16.

Fitchley

49.

(1) And to life for life, and in case may after and Chancell and land the

days, or the like; the covenant is void. So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good estate of land to her in fee simple, or otherwise, or to find her maintenance, or to give her so much by the year; these are good covenants. And generally, where the matter being in a condition will make the condition void because it is against law; there it being in a covenant will make the covenant void (1).

*See Condition Num. 7.* If a lessor covenant with his lessee, that he shall and may have houseboot, hayboot, plowboot, &c. by the assignment of the bailiff of the lessor; this is a good covenant; and yet it seems it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor; this is a good covenant and doth restrain him; for in this and such like cases the rule is, *modus & conventio vincunt legem*.

*Mich. 36.* If an obligee covenant with the obligor, that he will not sue him upon the obligation until Easter following; this is a good covenant, but no release, or suspension of the debt.

† If there be Lord and tenant of three acres of land, white acre, and two others, and the Lord grant to the tenant by deed that he will not distrain in white acre for his rent or services; this is a good covenant, but doth not determine the seignior.

If a man grant a mill within his manor, and covenant for him and his heirs, that there shall be no other mill set up within the manor; it seems this is a good covenant.

If one make a lease wherein are divers covenants to be performed on the part of the lessee, and after the lessee doth covenant, that if any of the covenants be broken, that the lessor shall enter upon the land demised, and hold it until the lessee make him \* amends for the damage done by the breach of the covenant; it \* P. 165. seems this is a good covenant, and that the lessor may take advantage thereof accordingly.

If a man, seised of land in fee, covenant to stand seised of it to uses, and no estate doth rise by the covenant; yet this may be good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in consideration of a marriage, his lands shall descend, remain, or revert to his son and heir apparent, and to the heirs of his body, on the body of his wife; in this case the covenantee may have a writ of covenant, upon the covenant. For if a covenant be present, as that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by the law in the case; in this case no action of covenant will lie upon this covenant: for this action will never lie upon any covenant, but upon such a covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done; and not when it is

(1) And therefore if a man on his marriage settles lands to himself for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and in the same deed covenants not to suffer a recovery; that covenant will not restrain him; for he may afterwards by suffering a recovery vest the land in himself in fee and devise it by will: for by the old Chancellor the covenant does not bind the land so as to defeat the will or recovery, but the covenant will bind the assets of the settlor. 1 Pr. Wms. 104. *Collins v. Plummer*.

for a thing present, as when *A.* doth covenant with *B.* that his black horse shall be for ever after the horse of *B.* this is no good covenant to give the horse to *B.* or to give him an action of covenant for him, but *A.* may keep him still notwithstanding (1).

If one mortgage upon condition to re-enter upon payment of an hundred pounds at a day, and the mortgagee doth covenant that he will not take the profits of the land until default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits until the day of payment come.

5. What shall be said a good covenant in law, upon which an action of covenant may be had: and what not.

Warranty.

If one make a lease for years of land by the words [demise or grant,] and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title, during the term; and upon this the lessee, his executors, administrators, or assigns, may have an action of covenant if he be disturbed (2). But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant. *Expressum facit cessare tacitum.* And therefore herein this is not like to the case, where a man doth make a lease for life by the words of *dedi & concessi*; or make a lease for life by other words reserving rent; (in which cases the law doth create a warranty against all men during the life of the lessor); for if in these cases there be an express warranty in the deed, yet this doth not take away nor qualify the implied warranty; but the lessee may make use of which of them he will, if he be ousted or evicted by one that hath an elder title (3).

\* P. 166.

6. How a covenant in deed or law shall be taken and expounded: and how it shall be performed. Joint and several.

\* A covenant in particular (being one part of a deed) is subject to the general rules of exposition of all parts of deeds in general, as: 1. To be always taken most strongly against the covenantor and most in advantage of the covenantee (4). 2. To be taken according to the intent of the parties (5). 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it shall be done in reasonable time, and the like (6).

In cases where the covenantees have, or are to have, several interests or estates, there, when the covenant is made to and with the covenantees, *& cum quolibet eorum, aut altero eorum*; in this case these words make the covenant several: as, if one by indenture demise black acre to *A.* and white acre to *B.* and green acre to *C.* and covenant with them and either of them, or covenant with them and every of them, that he is

(1) In order to create a good covenant to stand seised to uses, it is necessary that the covenantor should be seised at the time of making the covenant; that the covenant should be by deed, and not by parol; that it should contain apt words, and a manifest intent; and that it should be made on sufficient consideration, otherwise no use will arise. See fully post, in the chapter on Uses. *Com. Dig. Covenant (C).* 1 Wood 647. *Vin. Abr. Uses (B. a.) (Z. a.)*

(2) Accordingly *Cro. Jac.* 73. *Dier* 257. a. 2 *Leon* 104. See further as to action of covenant on the word *demise*. *Gilb. Covenant* 36. *Shep. Law of Assur.* 544.

(3) See further as to covenants created by implication of law, and in what cases action of covenant may be had thereon, *Vin. Abr. Covenant (G.) Com. Dig. Covenant (A. 4.) Garranty (A.)—Bac. Abr. Covenant (B.)*

(4) As if *A.* covenants with *B.* that if *B.* marries his daughter he will pay him 20*l.* per Annum, without saying for how long, yet it shall be for the life of *B.* and not for one year only. 1 *Lev.* 102. See further *Bac. Abr. Covenant (F.)*

(5) See accordingly *Sir T. Raym.* 464.

(6) How a covenant shall be expounded with regard to the context, or to synonymous, or other words. See *Com. Dig. Covenant (D.) Vin. Abr. Covenant (L. 4.)*

law



*Of a* COVENANT.

*Conscience* 163  
 eve- 3 Nov. 263  
 ove- 2 Mo 2. 82  
 And 5680  
 the Peckham & Clapham  
 be 1. Squidder 153  
 ove- 1 Bat 469w. 153  
 15 Bat 438  
 he For 588  
 , or enjoying.  
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 d to : T. 245  
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 ttle, if she only be a  
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 ow- with to Peckham  
 ttle, & Clapham  
 And 3 B 2 + 9 78  
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E. 4. 6.  
Bro. Grant.  
164.

If one covenant with another to acquit him of all charges  
issuing out of the land, and after by parliament the tenth part

(3) For the construction of the words in a covenant notwithstanding any act done by the covenantor, see *Vin. Abr. Covenant* (T.) *Cro. Jac.* 233. *Procter v. Johnson*.

of the value, out of the issues of all lands, are given to the King; in this case it seems the covenant shall not extend to this. But if the parliament had given the tenth part *exitum terræ*; the covenant would have extended to this as well as to rents, commons, and such like things, wherewith the land is charged.

To make assurances of land.

If *A.* covenant with *B.* to make such assurance, or such further assurance of land as the counsel learned in the law of *B.* shall devise; in this case albeit *B.* be learned in the law himself, yet he may not devise this assurance, but some other learned in the law must advise, otherwise *A.* is not bound to make it (1).

And if *A.* covenant with *B.* to make such assurance of land by a day, as *B.* or his heirs shall devise; in this case *B.* or his heirs must first devise the assurance, before *A.* is bound to do any thing. And therefore if one sell land for money, and the vendee doth covenant to make back to the vendor and his heirs, such assurance of the land as the counsel of the vendor shall devise, within one year, provided that if the vendee make default in the assurance, then if he do not pay twenty pounds to the vendor, that then the vendee shall stand seised to the use of him and his heirs; and the vendor tender no assurance, and the twenty pounds is not paid; in this case the land is in the vendee freed from the covenant. And therefore in these and such like cases, where a man is to make such assurance, as *A.* or his heirs, or their counsel shall devise; *A.* or his heirs must take care that in time they have an assurance reasonably drawn and ready to be sealed, and to tender it to him that is to seal it, for until then there can be no breach of covenant. But if *A.* be bound to make a feoffment, lease, or other assurance of land to *B.* by a day; in this case *B.* need not to demand it or tender the assurance, for *A.* at his peril must do it, otherwise he doth break his covenant. \* And yet if in this case *B.* do get the assurance drawn, and tender it to *A.* it seems *A.* is bound to seal it, or \* otherwise he doth break his covenant. † And if the case be so that *A.* is bound to make such assurance to *B.* by a day, at the costs of *B.* in this case *A.* must do the first act, viz. notify to *B.* what manner of assurance he will make, that he may know what money to tender; and when the money is tendred, *A.* must see that he do make the assurance accordingly at his peril; and if he fail in either of these, the covenant is broken.

If *A.* be bound to make such assurance to *B.* as by the counsel learned of *B.* upon request made shall be devised; in this case it is sufficient if the advice be given to *B.* and that he do make it known to *A.* and it is not needful it be given to *A.* immediately. And if *A.* covenant with *B.* to make such assurance to *B.* as *I. S.* shall devise, and *I. S.* doth devise a reasonable deed of bargain and sale, and he tender it to *A.* to seal; in this case *A.* is bound to seal it presently, and he shall not have time to advise with his counsel upon the deed; but if he be illiterate and cannot read the deed, he may refuse and delay to seal it until he can get some body to read it, which he

(1) As to covenants to make such assurance as counsel shall advise; to make assurance generally; and for further assurance, see fully in *Vin. Abr. Covenant* (W.) (G. 2.) 1 *Wood* 417. *Gilb. Covenant* 209. 216. *Cir. Jac.* 251.

*Experientia.* must do as soon as he can. And if one be bound by covenant to make an assurance upon request: the covenantee must request, and tender an assurance also, and he must tender such a one also as is reasonable, otherwise the covenant will not be broken by the refusal or neglect to do it: as if one be bound to make a feoffment to *A.* upon request; in this case *A.* must get a naked deed of feoffment drawn without warranty or covenants, and tender it. And if the covenant be to make such a lease as the former; in this case the second lease must not differ from the former, and if it do, the party is not bound to seal it.

*Curia Hil.* If one covenant to levy a fine at the next assises for thirteen years  
7 *Jac. Co. B.* *extunc*; this shall be taken from the time of the fine levied, and not from the time of the covenant.

*Adjudged in* If one bargain and sell land to me by deed indented, and be-  
*Sir Jo. Brets* fore the inrolment of the deed I do covenant with *I. S.* to convey  
*case.* all the land whereof I am seised, and to do this before such a day, and before the day the deed is inrolled; in this case my covenant shall not extend to this land conveyed to me by this bargain and sale.

*Dier 371.* If *A.* covenant with *B.* that in consideration of a marriage between the son of *A.* and sister of *B.* that he, at the costs of his son, and by his sufficient deed, will before Easter day assure land to his son, and *B.* doth covenant that if *A.* do perform this, then he will make him a general release; in this case, albeit *A.* be ready, if the son do not tender the assurance, and the conveyance is not made, *B.* is not bound to make any release.

*Fitz. Cove-* If one covenant to keep and leave a house in the same, or as To repair  
*nant 4.* good plight, as it was at the time of the making of the lease; the house.  
in this case the ordinary and natural decay of it is no breach of  
\* the covenant; but the covenantor is hereby bound to do his best \* *P. 169.*  
to keep it in the same plight, and therefore to keep it covered,  
*Ec (1).*

*Dier 19.* If the words of a covenant be [that the lessee shall have thorns For the  
by the assignment of the lessor, and necessary fuel also;] it seems having of  
by this, that there must be an assignment of the fuel as well as of houseboot,  
the thorns. &c.

*Dier 19, 20.* If the lessor covenant with his lessee, that he shall have sufficient hedgeboot by assignment of the bailiff of the lessor; in this case and by this, the lessee is not restrained from that liberty that the law doth give him, and therefore that he may take without assignment: but if the words be negative, that he shall not take without assignment, or that he shall take by assignment, and not otherwise, *contra (2).*

*Trin. 21 Jac.* If *A.* doth covenant with *B.* that whereas a marriage is intended To convey  
*BR. George* to be solemnized between *A.* and *C.* the daughter of *B.* at or be- lands of the  
*versus Lane.* fore the fourteenth day of *August* next, and whereas the said *B.* value of,  
hath paid to the said *A.* a thousand pounds for portion, &c. the &c.  
said *A.* in consideration thereof doth covenant with *B.* that he, within one year of the day of the marriage, will assure lands of the value of four hundred pounds *per Annum*; in this case albeit the

(1) See accordingly and further, in *Gilb. Covenants* 149. See more amply how covenants to repair shall be expounded, post — Also *Finch Rep.* 86. *Lant v. Norris*, 1 *Burr.* 287. 1 *Willy. Rep.* pt. 1. p. 75.

(2) See accordingly *Sherwood v. Nonnes's case*, 1 *Lern.* 250.



That the  
lessee shall  
make  
estates.

That if the  
lessee sell,  
the lessor  
shall have  
the first re-  
fusal.

To do one  
thing for  
another.

That the  
lessee shall  
have the  
fee.

Assignees.

7. When a  
covenant in  
deed or law  
shall be said  
to be broken:  
and when  
not: and  
how.

marriage be not on or before that day, yet the covenant must be performed (1).

If one make a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; in this case, it seems this covenant shall not be taken to enable the lessee to make estates for a longer time than his estate will bear.

If the lessee covenant with the lessor, that if the lessee be minded to sell his estate, the lessor shall have the first refusal; in this case when the lessee is minded to sell, he need do no more but acquaint the lessor with his purpose, and know his mind, and if he do not answer him presently, he may sell it to whom he will: and if the covenant be further, that the lessor shall give as much as another will, the lessee must tell him what another doth offer him, and ask him whether he will give so much, and if he refuse, or do not accept it presently, the lessee may sell to whom he will.

If one covenant to serve me a year, and I covenant to pay him ten pounds for it; in this case albeit he do not serve me, yet I must pay him the ten pounds. But if I covenant with him to pay him ten pounds if he serve me a year, *contra*, for in this case I am not bound to pay him the money unless he serve me a year. So if one covenant to make new pales so as he may have the old, in this case it seems he is not bound to make the new pales unless he may have the old pales. So if one covenant to pay money for service, counsel, or the like, or covenant to marry one's daughter, or make an estate, and the covenant is penned conditionally, and \* so as one thing is the cause of another, and it is not set down by mutual and reciprocal covenants; in all these cases, if the cause, or condition, be not observed, the covenant shall not be performed.

If one make a lease for ten years, and covenant that if the lessee pay him ten pounds within the ten years that he shall have the fee simple, and the lessee surrender his estate within the time; in this case, if the lessee pay the money, the lessor is bound to make the fee simple to him. But if the words of the covenant be, that if he pay him ten pounds within the term, he shall have the fee, and the lessee surrender his term, and then pay the ten pounds; in this case the lessor is not bound to make the fee simple, for it was not paid within the term.

If one covenant to do a thing to *I. S.* or his assigns, or to *I. S.* and his assigns by a day, and before the day *I. S.* die; in this case it must be done to his assigns if he before the day name any assignee, and if he do not, it must be done to his executor or administrator which is an assignee in law. See more in *condition, numb. 8. obligation, 7.*

If one be seised of land in fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate, he doth covenant that he is lawfully seised or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c. and in truth he hath not, but some other hath an estate in it before; in this case the covenant is broken as

(1) As to covenants to convey lands of such a value; or that they are, or shall be, of such a value; see fully in 1 *Ld. Raym.* 365. *Cre. El.* 43. 1 *Rel. Abr.* 429. and the case of *Langton v. North*, 2 *Chanc. Rep.* 140.

Adjudge  
Sir Peral  
Brocas c  
32. Q

Mich. 8 J  
Lams ca  
Dier 328  
F.N.B. 1  
26 H. 8.  
Hil. 39 E  
B.R. Cor  
cale. F  
Covenant  
26 Bro. C  
venant. 4

20 Jac. Br  
Covenant

Hil. 20 Ja  
adjudged  
B. R.  
Butler ver  
lus Lady  
Swinton

Swans case  
M. 7 & 8 E

Dier 42.  
26 H. 8. 3  
Fitz. Cove  
nant 6. 26.

(1) And  
to convey;  
cording to  
(2) See  
pl. 4. *Cre*  
(3) *Lesio*  
The breach  
quietly enj  
fore, defen  
to oblige h  
conditional  
*v. Bickel-Be*  
(4) For f  
657. *Palme*

Adjudged  
Sir Perall  
Brocas case  
32. Q.

soon as it is made (1). And if I bargain and sell land, by deed indented, to B. and before the deed is inrolled, I grant the same land to C. and covenant that I am seised of a good estate of it in fee, and after the deed is inrolled; in this case the covenant is broken (2). *Coff v Howell* 9 Lawd. 547. *Said in old deed is a defeasance*

That the  
covenantor  
is seised of  
a good  
estate, &c. *Feame*  
C. 1387

Mich. 8 Jac.  
Lams case.  
Dier 328.  
F.N.B. 145.  
26 H. 8. 3.  
Hil. 39 Eliz.  
B.R. Cornes  
case. Fitz.  
Covenant  
26 Bro. Co-  
venant. 40.

If A. let land to B. and covenant that he shall quietly enjoy it without the let of any person whatsoever, and A. himself, or any other person that hath any title to the land by or under him, as if he make a lease of it, or grant a rent out of it to another, or any other person that hath any title to the land, albeit it be not by or under A. as if A. were a disseisor, and the disseisee do enter or disturb B. in all these cases the covenant is broken (3). And so also is the law deemed to be by some in case of covenant in deed for quiet enjoying, where a stranger or one that hath no title to the land doth enter or disturb B. But otherwise it is in case of covenant in law for quiet enjoying; for in this case if a stranger that hath no title to the land doth enter or disturb the lessee, this is no breach of the covenant in law. And in all cases where any person hath title, the covenant is not broken until some entry or other actual disturbance be made by him upon his title.

For quiet  
enjoying.

*Demise in plain  
a general covenant  
in law 4 J. 389*

20 Jac. Bro.  
Covenant 7.

If a man make a lease of land, and after make a feoffment of the same land, and the feoffee doth disturb the lessee; in this case it hath been said this is a breach of the covenant for quiet enjoying. *Sed quere.*

\* P. 171.

Hil. 20 Jac.  
adjudged  
B. R.  
Butler ver-  
sus Lady  
Swinerton.

If a man purchase land to him and his wife and his heirs in fee, and then make a lease for years of it to I. S. and covenant for him, his executors and assigns, that the lessee, his executors and assigns, shall quietly hold and enjoy the premises without the let of the lessor, his heirs or assigns, or any other person by or through his or their means, title or procurement, and after the lessor doth die, and his wife doth enter and disturb; in this case and by this means the covenant is broken (4). And so it is also, if A. purchase land of B. to have and to hold to A. for life, the remainder to C. the son of A. in tail, and after A. doth make a lease of this land to D. for years, and doth covenant for the quiet enjoying as in the last case, and then he dieth, and then C. doth oult the lessee; in this case this was held to be no breach of the covenant. So likewise if A. be seised of white acre in fee, and take to wife B. and then make a lease of it to C. with such a covenant as before for the quiet enjoying, and then A. doth die, and after B. doth recover dower; by this the covenant is broken, and yet if the mother of A. recover dower and oult the lessee, *contra*. So also if a tenant

Swans case  
M. 7 & 8 El.

Dier 42.  
26 H. 8. 3.  
Fitz. Cove-  
nant 6. 26.

*As in this case  
there was no  
actual covenant  
between the parties  
but the  
dower  
by the  
Sug. 2. Vendor 551*

(1) And if two men upon sale of their wives lands covenant that they and their wives have good right to convey; if one of the women is under age, it is a breach, for she hath not the power to convey according to the covenant. *Nash v. Ashton*, Sir T. Jones 195.

(2) See more fully as to covenant that grantor is seised in fee, &c. *Fin. Abr. Covenant (Y.) Parols (D.)* pl. 4. *Cro. Jac.* 369. 3 *Lev.* 46.

(3) Lessor covenanted that lessee paying the rent and performing the covenants should quietly enjoy. The breach assigned was a disturbance by the lessor, who pleaded that till such a time the plaintiff did quietly enjoy, but then he cut down wood, which was contrary to his covenant, and then, and not before, defendant entered, and so by plaintiffs not performing his covenant, the defendants covenant ceases to oblige him; whereunto plaintiff demurred.—The question was whether the defendants covenant was conditional or not? Judgment was given for the plaintiff that the covenant was not conditional. *Hays v. Bick. Staffe*, 2 *Mod.* 35. See further in page 163. before.

(4) For the claims by the means of the baron, and she is therefore within the covenant, *Cro. Jac.* 657. *Palm.* 339. S. C.

in tail doth make a lease with such a covenant, and his issue doth disturb the lessee; this is no breach of the covenant. And yet if the lessor be the cause of the gift in tail, or procure the disturbance, this may be a breach of the covenant. And so also it is where a man is seised of land in fee, and he doth make a lease with such a covenant, and afterwards he doth die, and then his heir is in ward by reason of a tenure, and hereby the lessee is disturbed; it seems this is no breach of this covenant.

If one covenant that the wife he is about to marry shall quietly enjoy all her goods, and that the covenantee shall take it into his possession, and the husband doth only take the goods and keep them in his possession; this is no breach of the covenant. Curia, B. R. Paic. 6. Car. Crowles case.

If a covenant be for the quiet enjoying against all persons but the King and his successors; and the patentee of the king do disturb; this is a breach of this covenant. Adjudged Hil. 38 El. Woodroffe versus Greenwood.

If two make a lease, and covenant that the lessee shall enjoy the land without the let of them or any other, and one of them alone doth disturb the lessee; this is a breach of the covenant. Adjudged Mich. 2 Car. B. R. Sanders case. Dier 240.

If a lessee grant and assign all the land contained in his lease to A. and doth covenant with him that he hath not done any act or thing by which the grant or assignment might be impaired, but that the assignee his executors, &c. may enjoy it against all persons, and before this time the wife of the lessor had recovered and had execution of a third part of this land for her dower; in this case this, *but that, &c. do refer to the former, and are not absolute.* Adjudged Rich. 13 Jac. Co. B.

• P. 172.

If A. grant the bailiwick of W. to B. for life, and B. assign it to C. for three years, and after to D. and C. doth covenant with D. that he will not do, or suffer to be done, any act during the said three years by which the grant made by A. may be forfeit, but that after the three years ended he may enjoy it in as ample manner as C. did, or might have done, without any act by C. and after the three years ended, C. doth execute a process there, and thereby incroach upon the office; this is no breach of the covenant.

To free from charges and incumbrances.

If A. grant land to B. and his heirs rendering ten pounds rent, and B. doth sell the land to C. and his heirs, and doth covenant with C. that from such a day he shall enjoy it discharged of all incumbrances, and before that day a common recovery is had against C. in which A. is vouched, and this is to the use of C. and his heirs, supposing hereby the rent had been gone which is not so; in this case the covenant is broken, for this rent is an incumbrance. Curia Hil. 20 Jac. Co. B. Greenway & Tuckfield's case.

If a lease be made of land for years, and the lessee devise it to his wife *durante viduitate*, and after to his son, and he in reversion doth sell the fee to the woman during the widowhood, and doth covenant that the land is discharged of all former sales, rights, titles, charges: in this case the covenant is broken at the first by reason of the possibility of the son (1). Co. 10. 51.

(1) And in action of debt on bond for performance of the covenants in the lease, brought by the administrator of the widow, against the administrator of the reversioner the grantor,—Judgment was for the plaintiff. See this case as stated by the Ch. J. in 10 Co. 52. and the points resolved therein.



9 Eliz. Co. B.

If *A.* grant white acre to *B.* and covenant that *B.* shall enjoy it against all incumbrances, and *C.* doth disturb him in the taking of common there, and this is a common which is against common right, and which he hath by prescription: in this case it seems this is a breach of the covenant. But if it be of a common that is of common right, *contra* (1).

Dier 139.

If *A.* covenant with *B.* before Easter to make him a good sure estate of land, discharged of all former bargains, leases and incumbrances whatsoever, (leases or grants for life, or years, reserving the ancient rent, during the term, only excepted) and *A.* after this, and before the estate made, doth make a grant of all or part of the land reserving the old rent, it seems this is no breach of the covenant. To make estates and assurances.

Co. 5. 21.

If one make a lease to *I. S.* for years, and covenant with him that upon the surrender of that lease he will make him a new lease, and the lessor, before *I. S.* can make any surrender, doth sell away the reversion, or make a lease to another of the land, and so disable himself, this is *ipso facto* a breach of the covenant, without any surrender made by the lessee, which in this case is not needful. For *Lex neminem cogit ad vana & in-utilia peragenda*. So if one be seised of land in fee, and covenant to make a feoffment of it to *I. S.* by \* a day upon request, and the covenantor before the day doth \* P. 173. make a feoffment of it to another, and then doth die before any request made to him; in this case the covenant is broken. How can this be reconciled with the doctrine page 174.

Dier 338.

Co. 2. 3.

If *A.* covenant with *B.* to make such assurance as *B.* or as the counsel learned of *B.* shall devise, and *B.* tender such an assurance to *A.* to seal, and *A.* doth refuse or delay to seal it; this is a breach of the covenant.

Brn. Covenant 3.

If *A.* doth covenant with *B. C. D.* and *E.* to make them a feoffment such a day, and they come to the land at the time to take it, and *A.* doth not make the feoffment; by this the covenant is broken. And so also if *B.* and *C.* only, or one of them, doth come to the land; for it may be made to any of them in the name of the rest. But if none of them come to the land, albeit the feoffor never come, there it seems the covenant is not broken.

Curia B. R.

If *A.* covenant with *B.* before Easter next, to assure his house to him and *K.* his wife, during the life of *I. S.* and *A.* surrender his house to the use of *B.* and such person as *K.* shall name, at the request of *B.* in this case the covenant is broken, for this is no performance of it.

Dier 324.

If one covenant to repair, sustain and amend a house, and the house is burnt by the negligence of the covenantor and not repaired again; this is a breach of this covenant (2). And if the lessee covenant for him and his executors to repair at his own costs, (the principal timber, not hurt, nor in decay for lack of reparations or otherwise in default of the lessee or his executors only except) and he die, and afterwards the house is burnt in default of the executors; in this case the covenant is broken and the executors may be charged (3). To repair.

Fitz. Covenant 29.

Co. 5. 15.

F.N.B. 145.

Co. 1. 98.

Peck Sect. 738.

Dier 33.

Plew. 29.

40 E. 3. 5.

If one covenant to leave a wood in the same plight he finds it, and he cut down trees; in this case the covenant is broken present-

(1) See further as to covenants free from incumbrances, in *Vin. Abr. Covenant* (A. a.) 1 Wood 415. *Gib. Covenant*, ch. 31.

(2) In the case of *Compton v. Allen*. *Sti.* 162. *Roll. Ch. 7.* said, "That a lessee that covenanteth to repair, ought to do it if the house be burnt, be it by negligence, or by other means." See further on this point, in the case of the *Earl of Chesterfield v. Duke of Bolton*. *Comyns R.p.* 627.

(3) *De bonis testatoris tantum*. See *Dyer* 324. b.

ly, for it is now become impossible to be performed by his own act: but if in this case some of the trees be blown down with the wind, or the like, by this the covenant is not broken; for it is now become impossible to be done by the act of God, and in this case the covenantor is not bound to supply it (1). And so likewise of a covenant to repair houses, or if one covenant to sustain houses, or sea banks, or covenant to leave them in as good case as one doth find them, and the houses be burnt, or thrown down by tempest, or the like, or the banks be overthrown by a sudden flood, or the like accident; in this case the covenant is not broken by this accident only; but if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken. And if houses be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant for I may re-edify them, \* and therefore no action will lie upon this covenant until the end of the term.

\* P. 174.

If one covenant to repair a house before a day, and it happen the plague is in the house before and until the day; and thereby it is not done; in this case the covenant is not broken, for this will excuse; but then it must be done in convenient time afterwards, for otherwise the covenant will be broken.

Hil. 8 Jac.  
Curia.

If a lessee covenant to do all the reparations of a house demised, at his own costs and charges, and he cut trees upon some of the ground demised to amend the house; it seems this is a breach of his covenant (2).

To pay money. If one covenant to pay money at five several days, and he fail of payment the first day; by this the covenant is broken (3).

Co. super  
Lit. 292.

To leave a stock, &c. If one take land sowed or a stock of cattle in lease for years, and the lessee covenant to leave it in as good plight as he doth take it; in this case he must leave it sowed again, and if any of the cattle die, he must make up the number, otherwise he doth break his covenant.

40 E. 3. 5.

Not to take toll. If a corporation do covenant not to take toll, and their common officer appointed for that purpose doth take it; this is a breach of the covenant.

43 E. 3. 17.

To build a house. If A. covenant with B. to build a house by a day, and B. doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this case the covenant is broken, for this will not excuse him: But if he do by any actual impediment hinder him, or be the cause why the thing is not done, then the not doing of it is no breach of the covenant. And therefore if a lessee covenant to cleanse one of the ditches in the land demised,

18 E. 4. 8.  
Kelw. 34.  
Ttin.  
36 El. B. R.  
Carrell ver-  
sus Reade.

(1) Many parts of the *Touchstone* have been selected by subsequent writers; but it is rather singular that the passages in the text should be repeated in *Wood* 397 and in 399. in *Gilb. Covenants* 150 and in 473; tho' this book is not referred to in either of those places.

(2) As to the extent and construction of covenants to repair, in addition to the references before in page 165. note 1, see *Vin. Abr. Covenant* (L. 5.)

(3) An action of covenant lies upon the first default, but an action of debt will not lie till the last. See 3 Co. 22. a. In *Co. Lit.* 292. b. a distinction is taken between a debt due by contract or bond, and a debt due by recognizance, for if a recognizance be to pay money at five several days, after the first day of payment, (and default) execution may be taken on the recognizance for the whole sum, it being in the nature of several judgments; but no action of debt will lie on the bond or contract, before the last day be past. See further as to covenants for payment of money. *Stiles* 59. 172. A covenant to pay money which is by deed cannot be discharged without deed. See *Rogers v. Payne*, 1 *Wilf. pt. 2. p. 376.*

and

(1) See  
nant (E)  
and how,  
(2) And  
covenant b  
have an ac

and the lessor enter upon the land itself and keep out the lessee, and he doth not cleanse the ditch by the time; by this the covenant is broken: but if in this case the lessor do by force keep the lessee out of the ditch or place itself, *contra*.

To cleanse a ditch.

Hil. 16 Jac.  
B. R. Sili-  
ard versus  
Loc.

If *A.* and *B.* be jointenants of a shop, and *A.* covenant with *B.* that he and his assigns shall have free ingress and egress in and out of the shop, and *A.* doth appoint *C.* his servant to enter as servant to him and to occupy in common with *A.* and this servant doth expel the servant of *B.*; in this case, this is a breach of the covenant.

To have liberty to go in and out of a shop.

3 H. 4. 8.

If *A.* covenant with *B.* that *B.* shall come four times a year into the house of *A.* without being ousted by *A.* and *A.* when he doth see *B.* coming, doth shut the doors and windows, and doth not suffer *B.* to come in; by this the covenant is not broken.

To come in to a house.

33 H. 6. 16.  
Bro. Cove-  
nant 3. Fitz.  
Barre 62.

If *A.* covenant with *B.* to marry the daughter of *B.* make a feoffment, or do any other act to *C.* (who is a stranger to the covenant) and *A.* doth tender it and offer to do as much as doth lie \* in his power, but the stranger doth refuse it, and thereby it is not done; yet this doth not excuse, but the covenant is broken. But if the covenant be to do any such act to the covenantee himself, and the covenantor tender it and the covenantee refuse it; by this the covenant is performed (1).

To marry another. Make a feoffment, &c. Tender and refusal. \* P. 175.

Mic. 7 Jac.  
Co. B.

See more in the last question, and in *obligation numb. 7, 8, 9, and in condition numb. 9, 10.*

849/49  
m + S322

Any one that is party to the deed to whom the covenant is made, may take advantage of the covenant, but not a stranger; for if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he doth it not, *B.* and not *C.* must sue him upon this breach.

8. Who shall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it: or not.

Co. 5. 17.  
Dier 257.  
47 E. 3. 12.

If a lease be made of land to a husband and wife for years, and the lessor doth enter upon the land and put them both out, or the one of them after the death of the other, in this case both of them whilst they both live, and the survivor, after the death of one of them, may have this action of covenant upon the covenant in law. So if a wardship be granted to a woman by deed, and she take a husband and die; the husband shall have advantage of this covenant in law made by the word [grant] if he be disturbed. So if one by the words [demise or grant] lease land to a woman sole for years, who taketh a husband and dieth; in this case if the husband be disturbed he shall take advantage of this covenant in law.

Dier 338.

If a feoffment be made in fee, and the feoffer doth covenant to warrant the land, or otherwise, to the feoffee and his heirs; in this case the heir of the feoffee shall take advantage of this (2). As if *A.* covenant with *B.* and his heirs, to infeoff *B.* and his heirs of land, and *B.* die before it be done, in this case his heirs shall take advantage thereof. And if *A. B.* and *C.* have lands in coparcenery, and they purchase other lands in fee, and they covenant each to other his heirs and assigns, to make such conveyance to the heir of him that shall

Heir.

1 m + S357  
2 Bough 165

(1) See more amply what shall be deemed a breach or performance of a covenant, *Com. Dig. Covenant (E) Vin. Abr. Covenant (L. 7.) Gilb. Covenants 184. Bac. Abr. Covenant (H.)*—In what cases, and how, a court of equity will decree a performance of a covenant, see *Com. Dig. Chancery (2 X.)*

(2) And where the covenant relates to the inheritance, and is such as runs with the land, though the covenant be with the lessor his executors and administrators, without naming the heir, yet the heir shall have an action of covenant for breach. 2 *Lev. 92, Lougher v. Williams.*



Executors  
and admini-  
strators.

die first, of a third part, as he shall devise, in this case the heir, not the executor, shall take advantage of the covenant.

Executors and administrators shall take advantage of inherent covenants, albeit they be not named (1). And therefore if *A.* covenant to do a thing to *B.* and do not name his executors or administrators, and it be not done, it seems the executors or administrators of *B.* may have an action of covenant for the not doing of it. As if one covenant with *I. S.* to pay him money at Michaelmas and do not say to his executors, &c. and he die before the time; in this case his executor or administrator shall take advantage of this covenant and may recover the money.

Grantees of reversions shall have the like advantage against fermors (by action only) for any covenant or agreement contained \* in their lease, as the lessors, their heirs or successors might. And so also shall lessees against grantees of reversions (recoveries in value excepted) by the statute of 32 *H. 8. cap. 34.* And herein (as in the case of a condition before) a difference is taken between covenants that are inherent, and covenants that are collateral. For the covenants whereof grantees by this statute shall take advantage are inherent covenants, *i. e.* such covenants as do concern the thing granted and tend to the supportation of it: as where a lessee for life or years doth covenant with his heirs to keep the houses demised in good reparations, or the like, and after the lessor doth grant away the reversion of all, or part of the houses to *I. S.* in this case, *I. S.* shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion was granted. But if the lessee doth covenant with his lessor and his heirs to pay him a sum of money, or make him a feoffment or the like, and then the lessor doth grant the reversion to *I. S.* in this case *I. S.* shall not take advantage of this covenant; and yet the executors or administrators of the lessor shall take advantage of this covenant (2).

Regularly every assignee of the land or thing demised shall take advantage of inherent covenants; as if a covenant be, to have estovers to burn in the house demised, or to have timber to repair, or if the covenant be that the lessor or lessee shall repair, or the like. And therefore of these assignees in deed, and in law, assignees of assignees *in infinitum* shall take advantage, and assignees of executors or administrators, tenants by statute, or elegit, or after a sale upon a *feri facias*, a husband in the right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named, yet may he take advantage of it (3).

If a lease for years be made to *I. S.* by the words [demise or grant] and the lessee assign this over to *I. D.* in this case *I. D.* may take advantage of the covenant in law, and bring an action against the lessor if he be disturbed.

(1) Executor, although he is not named, yet shall have an action of covenant in all cases by the common law, because he is privy and quodammodo party, because he represents the person of the testator more than the heir, *Co. Li.* 208. 209. a. see further in *Gilb. Law of Covenants* 322.

(2) The reader will find the operation of the statute of 32 *H. 8. c. 34.* (which forms a material part of the doctrine of covenants) and to what persons it extends, clearly explained, and well supported by authorities, in *Bac. Abr. Covenant* (E. 6.) and in *Vin. Abr. Covenant* (K. 3.)

(3) See *Mier* 242. *Gidd.* 270. *Presc.* in Chan. 39.

Co. 5. 17.  
F.N.B. 145.  
H. Dier 112.  
271.

See Condi-  
on.  
Numb. 12.  
Co. 5. 18.  
9 Jac. B. R.  
Wilborne &  
Bestwick's  
case accord.

Mich. 8 Jac.  
Pime's case.

Co. 3. 63. If a lease for years be made of land, and the lessor doth covenant with the lessee and his assigns to do, or not to do, something; in this case an assignee by word, or an assignee by deed, may take advantage of this covenant (1).

Co. super Lit. 385. Co. 5. 23. 18. If two coparceners make partition of land, and the one of them doth covenant with the other to acquit her and her heirs of a suit that issued out of the land, and the covenantee doth alien her part to a stranger; in this case the alienee shall have the same advantage for acquital of the land, as the covenantee had. So if *A.* be seised of the manor of *B.* whereof a chapel is parcel, and a prior with the consent of his convent had covenanted with *A.* and his heirs \* Lords of the manor to celebrate divine service in the chapel, and after *A.* had sold the manor; in this case the vendee or assignee of the manor, should have had the same advantage of the covenant the vendor had. But if the Lord had sold the chapel, the assignee of the chapel should not have taken advantage of the covenant. And if a covenant be to say divine service in the chapel of a stranger; in this case the assignee of the manor in which the chapel is, shall not take advantage of the covenant (2).

Co. 5. 16. 17, 18. Regularly all those that do seal and deliver the deed, and are named and bound by the exprets words of the covenant, whether the covenant be collateral or inherent, are bound by the covenant contained in the deed; and therefore if heirs, executors, administrators or assigns be named in the covenant, for the most part they are bound by the covenant. And in all cases of inherent covenants also, where a man doth covenant for himself only, and doth not name his executors and administrators or either of them; they are bound and may be charged by the covenant notwithstanding. And in some cases the law is so also for collateral covenants. And in most cases of inherent covenants that tend to the support of the thing granted; (in respect of which it is presumed the lessor took the lessee for the land) such as have the land, albeit they be neither executors nor administrators or either of them but assignees, &c. shall be charged by the covenant though they be not named, for these covenants are said to run with the land.

Co. super Lit. 231. Dier 13. Bro. Covenant 6. Det. 80. If a feoffment, or lease be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees, or lessees, and one of them doth not seal, or the wife doth, or doth not seal during the coverture, and he, or she that doth not seal doth notwithstanding accept of the estate and occupy the lands conveyed or demised; in these cases, as touching all inherent covenants, as for payment of rent, and the accessaries thereof, as clauses of distress, of re-entry, of *nomine penæ*, reparations and the like, they are bound by these covenants as much as if they do seal the deed. So if a lease be made to *A.* for years, or life, the remainder to *I. S.* in fee, and there is a rent reserved, or there be divers covenants on the part of the grantees,

*word before  
stated in  
writing, sealed  
deed*

\* P. 177.

*Courten v. Hughes  
2 B. 2 P. 565*

9. Who shall be bound and charged by a covenant: and against whom a writ of covenant doth lie: and where, or not.

Executors Administrators.

*Covenant does not run to the Assignee of a mortgage for the land.*

*1 Mod 213  
5 M & S 400  
4 B & Al 286  
5 B & Al 1  
Vennar Smith*

(1) See further in what cases an assignee shall take advantage of a covenant, *Cro. Eliz.* 373. *Cro. Car.* 137. *Br. Abr.* Covenant, pl. 45. *Com. Dig.* Covenant (B. 3.) *Vin. Abr.* Covenant (K.) *Bac. Abr.* Covenant (E. 5.)

(2) See more fully who shall take advantage of a covenant and who not. *Com. Dig.* Covenant (B) *Wood* 37. *Vin. Abr.* Covenant (H.) *Gillb. Law of Covenants* 294, 319, 323. *Bac. Abr.* Covenant (E.)

and *I. S.* doth never seal the deed or counterpart; yet if in this case he accept the estate after the death of *A.* he must pay the rent and perform all the covenants that are inherent. So also if there be covenants in the King's Patent to be performed on the part of the patentee. As if there be this clause in the patent [and that *I. S.* (the patentee) shall repair the house when it is decayed;] in this case the patentee is bound by this covenant, and all such like covenants. But *quære* of collateral covenants in the first cases, for therein it seems the feoffee or lessee is not bound. And yet it is said, that if an indenture \* be made between *A.* of the one part, and *B.* and *C.* of the other part, and therein there is a lease made by *A.* to *B.* and *C.* on certain conditions, and *B.* and *C.* are bound to *A.* by the indenture in twenty pounds to perform the conditions, and *B.* only doth seal the deed and not *C.*; yet in this case if *C.* accept of the estate he is bound by the covenants, and one of them cannot be sued without the other whiles they are both living. *Qui sentit commodum sentire debet et onus. Et transit terra cum onere.*

\* P. 178.

Heir.

If a man covenant for him and his heirs to do any thing whatsoever; hereby his heirs are bound (1). But otherwise except the heirs be bound by the deed by express name, an heir shall scarcely be bound or charged in any case by a deed. And therefore it is that if the lessee for years be ousted by any other but the heir himself, no action of covenant will lie against the heir, unless there be an express covenant wherein and whereby the lessor and his heirs are bound. But if he be ousted by the heir himself it seems an action of covenant will lie against him. And yet if he be ousted by an elder title from the lessor, *contra*, for in this case the heir shall not be charged.

Executors administrators.

If a man do covenant for himself only to pay money, build a house, for quiet enjoying, or the like, and he doth not say in the covenant [his executors, administrators, &c.] yet hereby his executors and administrators are bound and shall be charged (2). And yet if a lessee for years covenant for himself to repair the houses demised, omitting other words; it seems in this case he is bound to repair only during his life, and the executors or administrators are not bound (3). So if a lessor covenant for himself only to discharge the lessee of all quit rents out of the land; it seems this covenant is only personal, and shall bind the covenantor only during his life. But if in these cases these words [during the term] be added in the covenant, as if a lessee covenant for himself to repair the houses during the term, or the lessor covenant for himself to discharge the lessee of all quit rents during the term; in these cases it seems the executors and administrators also will be charged after his death (4).

If a lessee be ousted by one that hath title; it seems an action of covenant will lie for this ouster against the executor

(1) But the heir is only chargeable so far as he has *assets* by descent from his ancestor sufficient to answer the charge, 1 *Pr. Wms.* 777. *Finch. Rep.* 86.

(2) But upon a covenant *implied*, an action of covenant will not lie against an executor. *Moor* 74 *Swan v. Scarles*.

(3) See the case of *Tilney v. Norris*, 1 *Ld. Raym.* 553.

(4) See accordingly *Gilb. Covenants* 331.

Experiencia.  
Pasc. 14 Jac.  
B.R. Bro. &  
Cumber-  
land's case.

Co. Super  
Lit. 231.

Co. 5. 16.

\* P. 179.

Co. 5. 17.  
Bro. Co-  
venant 38.  
32 H. 6. 31.  
Dier 257.  
Fitz. Cove-  
nant 31.

10 H. 7. 10.  
Dier 19. 14.  
Bro. cove-  
nant.  
50 Dier 114.

Co. 5. 17.  
Dier 27. Bro.  
descend 30.

Co. 5. 17.

(1) In v.  
naming the  
nants 327.

(2) Men-  
cel of the  
though not  
more or le-  
done upon  
the benefi-  
cer's case.



or administrator upon the covenant in law, if he were put out in the life time of the lessor and not otherwise, for if there be tenant for life the remainder in fee to another, and the tenant for life by the words [demise or grant] doth make a lease for years and dye, and after, he in the remainder doth enter and put out the lessee for years; in this case he cannot upon this covenant in law charge the executors or administrators of the lessor. But upon an expresse covenant for quiet enjoying he may (1).

*Ex gr. & p. h. 4 n. 6 c. 6. 1. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

Co. 5. 16.

\* P. 179.

In some cases an assignee shall be charged though he be not named, and in some cases shall not be charged though he be named, and in some cases he shall be charged when he is named; as when the covenant doth extend to a thing in *esse*, parcel of the demise, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and shall bind the assignee though he be not expressly named, as a covenant to repair, &c. But if the covenant be annexed to a thing not in *esse* before, but *de novo* to be erected on the thing, as to set up a new house, or the like; in this case, it will not bind the assignees unless they be named in the covenant. And if the covenant be to do a thing merely collateral; in that case it will not bind the assignees albeit they be named expressly (2). Also when a contract is personal only, and a man doth bind himself and his assigns; his assigns shall not be bound hereby: as if one demise sheep, or other stock of cattle, or any other personal goods, for any time, and the lessee doth covenant for him and his assigns, at the end of the term to deliver them in as good plight as they were at the time of the demise, or such a price for them, and the lessee assign them; in this case, this covenant will not bind the assignee: but the executors and administrators of the first lessee are bound hereby. So if one demise a house and land, with a stock or sum of money, for years, rendering rent, and the lessee doth covenant for him and his assignees to deliver the money at the end of the term; in this case an assignee shall not be bound by this covenant, as the executors and administrators of the lessee shall.

Executors.

Co. 5. 17.

Dier 27. Bro. descent 30.

If a lessee covenant to repair the houses demised, or to discharge the lessor *de omnibus oneribus circa terram*, or the like; in these cases, and such like, albeit assignees be not named in the covenant, yet assignees, and assignees of assignees, *in infinitum*, and all others that shall come to the land by the act of law, or by the act of the parties, shall be bound and charged by this covenant.

Co. 5. 17.

If a lessee covenant for him and his assigns to build a new house upon the land demised, within seven years, and the lessee



(1) In what cases the heir, or executors, shall be bound by expresse covenant of the testator without naming them, and when an action will lie against them.—See *Vin. Abr. Covenant* (D.) *Gilb. Covenants* 327. *Com. Dig. Covenant* (C.) *Bac. Abr. Covenant* (E.)

(2) Mere collateral covenants that run with the land, that is, which extend to something in *esse*, parcel of the demise, and affect the estate, lie between all those who are privy in tenure or contract, though not named, like debt for rent at common law. And the reason is, because usually the rent is more or less accordingly, *et qui sentit commodum sentire debet et onus*. So a collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee by expresse words; because he is to have the benefit of it.—*Treatise of Equity* 39. See more amply on this subject the points resolved in *Spencer's case* 5 Co. 16.—Also *Mo. 399. Cro. Eliz. 457. Roll Abr. Covenant* (L.)

If the Assign is made before the breach of Covenant, it is charged, but not if made after.

assign it over: in this case, the assignee is chargeable (1). But if a man covenant for him and his assigns to make a feoffment, obligation, or the like, in this case the assignee shall not be charged albeit he be named. And if the lessee covenant for himself, or for himself, his executors and administrators, only, to build a new house upon the land demised, and the lessee assign over the land; in this case the assignee is not bound by this covenant.

If a lease be made rendering rent, and if it be in arrear that the lessee his executors and assigns shall forfeit three shillings and four pence *nomine pene*, and the lessee assign the term; in this case it seems the assignee shall be charged with the *nomine pene*.

\* P. 180.  
Note.

\* And in all the cases before, where a covenant is broken, an action of covenant may be brought (2). But herein note, that howsoever in divers of the cases before, assignees are chargeable upon a covenant, yet the lessee himself is not hereby discharged, but the

Election.

lessor or grantee of the reversion hath election to charge which of them he will. And therefore if a lessee covenant for him and his assigns to repair, and the lessee assign; in this case the lessor may have his action of covenant against either of them. And if a lessee covenant for him, his executors, administrators, and assigns, to repair the houses demised, and he in reversion doth grant away his reversion, and the lessee assign his estate; in this case, albeit the grantee of the reversion have accepted the rent of the assignee of the term, yet he may still have an action of covenant against the executor of the lessee upon this covenant (3). So if a patentee covenant for him and his assigns to repair, and he assign; the King may have his action against either of them (4).

If A. and B. do covenant for themselves jointly, without more words; the covenant is joint, and one of them cannot be charged without the other. But if they covenant for themselves severally, the covenant is several, and they may be sued apart. And if they covenant jointly and severally; then the covenant is joint and several, and they may be sued either way at the election of the covenantee.

10. When a covenant shall be said to be gone and discharged; and when not; and how.

Where the deed itself wherein the covenants are contained, or the estate, on which the covenants as accessory to the principal do depend, is gone and determined, there regularly the covenants are gone also. And therefore if a lease for life or years be surrendered, whereby the estate is gone, ~~or a deed become void by release or the like~~, and there be covenants contained in the deed; by these means the covenants are gone also.

(1) If the assignment is made within the seven years, but not otherwise.—Lessee covenanted for him and his assigns to rebuild and finish a house within such a time, and after the time expired, the lessee assigned over the premises, the house not being built and finished according to the covenant. The covenant shall not bind the assignee, because it was broke before the assignment: *aliter* if broke after, as if the lessee had assigned before the term expired. *per Holt Ch. J.* 1 Salk. 199.—S. P. 3 Burr. 1271.

(2) If a covenant is to make an estate in land, a suit in equity is most proper, because a Court of equity can give the thing itself, which is a higher and more adequate remedy than damages only, which is all the law gives. *per Ld. Hardwicke*, 3 Atk. 87. in the case of *Furnival v. Crew*—See that case; and further when remedy may be had in equity upon a covenant. *Com. Dig. Chancery* (2 X. 6.)

(3) But although he may bring such action against lessee after acceptance of rent from assignee, yet he may not demand the rent of the lessee after such acceptance—*per Jermain Just.* Sty. 300. *Whitway v. Pincent*.—See the same distinction in 1 Sid. 402. *Ord. Bull. N. 159*

(4) See more amply what covenants bind an assignee, and in what cases covenant lies against him. *Fin. Abr. Covenant* (L.) (M.) *Gilb. Covenant* 333. *Bac. Abr. Covenant* (E. 3.)

7 T.R. 312. *Lrd Kenyon* } *Dougl. 135*  
1 Bro. & Bing. 238 } *accumulated that mortgage is subject*

40 E. 3. 27.  
Bro. Surrender 47.  
Covenant 42.  
Hil. 4 Jac.  
B. R. Moil v. Austin.  
Co. 1 98.  
Flow 186.

Co. 4. 80.

18 E. 4. 8.

Pasc. 6 Car.  
B. R. Adjudged Bachelor's case.

(1) So like  
(2) See  
(3) See charged, or  
Chancery (2)

*Reuben v. Owen*  
*del. on*  
*Gill.*

40 E. 3. 27. But this surrender doth not discharge the breach of covenant *Breach of Covenant*  
 Bro. Surrender 47. Co-venant 42. Hil. 4 Jac. B. R. Moile v. Austin. *before surrend- or vacating of the Deeds good & the in Force!*  
 of God, as where one doth covenant to serve another seven years, and he die before the seven years be expired; by this the covenant is discharged (2).

Where a covenant is become impossible to be done by the act of God, as where one doth covenant to serve another seven years, and he die before the seven years be expired; by this the covenant is discharged (2).

Where there is an express covenant in a deed for quiet enjoying, the implied covenant is gone. *Expressum facit cessare tacitum.*

By a release of all covenants from the covenantee the covenant is discharged, so as the release be by deed; for a covenant by deed \* cannot be discharged by words. And therefore if A. by deed \* P. 181.  
 covenant with B. to build a house by a day, and B. doth with him to let it alone; this is no discharge of the covenant (3).

If the lessor accept the rent of the lessee, or his assignee, after a covenant broken; this doth not discharge the breach of the covenant, but the lessor may sue for it notwithstanding.

And so we come to a warranty, being a special kind of covenant, and therefore next in order to be spoken to.

(1) So likewise if a parson, after making a lease, becomes non-resident. *Cro. Eliz.* 78. 245.

(2) See accordingly *Gilb.* on covenants 472.

(3) See fully in what cases and in what manner covenants shall be said to be suspended, defeated, discharged, or void, in *Bac. Abr.* Covenant (G) *Gilb.* 470. 1 *Wood* 397. 429. *Com. Dig.* Covenant (F.) *Chancery* (2 X. 3.) *Vin. Abr.* Covenant (O).

Rent with no remedy but distress in arrears. Rent on possession granted over arrears are lost 46 58 6 Rent if secured by contract on which debt on account lie seems. 12 Mod 45 Minshelley v Dowdall  
 Gill. Ten 308 309 & notes



## C H A P. VIII.

## Of a Warranty.

1. Warrant-  
ty. *Quid.*

Warrantor.  
Warrantee.

2. *Quota-  
plex.*

A Warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same (1). Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this warranty is called the warrantor; and he to whom it is made, the warrantee.

There are two kind of warranties. 1. A warranty in deed, or an express warranty; which is when the same is expressed (2); *i. e.* when a fine, or feoffment by deed, is levied, or made in fee, or a lease for life is made by deed, comprehending warranty, or which hath an express clause of warranty contained in it; as when a consor, feoffor, or lessor doth covenant to warrant the land to the conseree, feoffee, or lessee; which is in these words: *Ego I. S. & heredes mei warrantizabimus & in perpetuum defendemus W. S. & heredibus suis tenementa predicta contra omnes homines in perpetuum* (3). And by the statute of *Bigamis*, *Dedi* is made an express warranty during the life of feoffor. 2. A warranty in law, or an implied warranty; which is, when it is not expressed by the party, but *tacite* made and implied by the law, whereof see divers examples *infra*. The warranty in deed also is either lineal, which is thus described: A covenant real, annexed to the land by him which either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land, as heir from him that made the warranty. Or else it is collateral, which is thus described: A warranty made by him that had no right or possibility of right to the land, and is collateral to the title of the land. Also there is a warranty which doth commence by disseisin or wrong; of all which

\* P. 182. \* see divers examples afterwards. And note that all these things here are to be applied to warranties of lands, and concerning freeholds and inheritances; for there is a warranty of goods and chattles in contracts, of which we treat not here (4).

(1) And either upon voucher, or by judgment in a writ of *warrantia charta*, to yield other lands and tenements to the value of those that shall be evicted by a former title, or else may be used by way of rebutter. *Co. Lit.* 364. a.

(2) By the feodal constitution, if the vassal's title to enjoy the fee was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompence. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold to himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) refusing back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied: they bearing no sort of analogy to the original feodal donation. And therefore in such cases it became necessary to add an *express* clause of warranty to bind the grantor and his heirs, which is a kind of covenant real and can only be created by the verb *warrantia*, or *warrant*. *Co. Lit.* 384. a. *Bl. Com.* 300. See also *Fitz. Nat. Brev.* 134. *Sullivan's* *Leñ.* 119.

(3) See *Ld. Coke's* observations on the words of the warranty, *Co. Lit.* 383. b.

(4) See further as to the several kinds of warranties, *Bar. Abr. Warranty* (A). *Com. Dig.* *Garranty* (h.) *Sull. Leñ.* 120. *1 Wood* 335.



Co. super  
Lit. 265.  
372. 365.  
384.  
Co. 4. 121.  
10. 97.

The fruit and effect of the warranty in deed is, that it doth always conclude and bar the warrantor himself of the land so warranted for ever; so that all his present and future rights, that he hath or may have therein, are hereby extinct. And therefore if the father be disseised, and the son in his life time release all his right to the land to the disseisor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land descendeth to the son; in this case, albeit the release doth not bar the son, yet the warranty doth bar him. And for the most part also it doth conclude and bar the heirs of him that made the warranty, to whom the same warranty doth descend, to demand the same land against the warranty; for if it be a lineal warranty, it is a bar of an estate in fee simple without any assents, *i. e.* without any other land descended to him in fee simple from the same ancestor that made the warranty: And with assents it is a bar of an estate in tail. And if it be a collateral warranty, it is, with or without assents, a bar of an estate in fee simple or fee tail, and all possibility of right thereunto; and yet so as it doth not pass any estate or right, but only bind the right, so long as the warranty is in force; for if the warranty be avoided the right may be revived. But neither the lineal nor collateral warranty can enlarge an estate. And therefore if a lessor by deed release to his lessee for life, and warrant the land to him and his heirs; this doth not make his estate greater, neither will it bar titles of entry, or action, in cases of mortmain, consent to a ravishor, mortgage, or dower. And therefore if an ancestor of the Lord hath title to enter upon an alienation in mortmain, and he release, or make a feoffment with warranty; this warranty will neither bar him nor his heir. So if a collateral ancestor will make a warranty, which doth after descend upon one that hath title of entry upon a condition broken; this will not bar his entry, &c. neither will it bar any right that shall commence after the warranty made. And the warranty that doth commence by disseisin doth not bind or bar any estate with or without assents.

Co. super  
Lit. 265.  
Co. 10. 98.  
99. Dier 42.  
Co. super  
Lit. 101.

And in cases where the lineal or collateral warranty is a bar, there if the party be impleaded by him or his heirs that made the warranty, the party impleaded that is tenant of the land, may plead and shew forth this warranty against him, and demand judgement, whether he contrary to his own warranty shall be suffered or received to demand the thing warranted; and this in pleading is called a rebutter (1). And if he be impleaded or sued by another for the land, then he to whom the warranty is made, or his heirs, may vouch, *i. e.* call in the warrantor or his heirs to warrant the land. And this is an interpleader, in the nature of an action brought by the warrantor against the warrantee, wherein he that doth vouch, (called the voucher) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the action, and the voucher is as it were out of the suit. And this second tenant, the vouchee, is called the tenant by the warranty. And hereupon shall issue forth to the sheriff a writ to summon the vouchee to appear, called a *Summons ad warrantizandum*. And

Rebutter.  
Quid.  
P. 183.  
Voucher.  
Quid.  
Voucher.  
Vouchee.  
Tenant by  
the war-  
ranty.  
Quid.

(1) For the derivation and explanation of rebutter, see Co. Lit. 303. b. 365. a. Cem. Dig. Warranty  
(K) 3) Pleader (K.) Vin. Abr. Voucher (A. c. 3.)

*Summons ad  
warranti-  
zandum.  
Quid.*

*Counterplea  
to the  
voucher.  
Quid.*

*Counterplea  
to the war-  
ranty.  
Quid.*

*Recovery  
in value.  
Quid.*

*Sequatur  
sub suo pe-  
riculo.  
Quid.*

*Dearraign-  
ment del  
Garranty.  
Quid.*

*Warrantia  
chartæ.  
Quid.*

\* P. 184

4. What  
words and  
clauses in a  
deed will  
make a war-  
ranty: or not.

if the vouchee appear he must plead to the voucher, and if he shew cause why he should not warrant, that must be tried; and this shewing of cause is called a counterplea to the voucher: but if he plead in avoidance of the warranty, it is called a counterplea to the warranty. And if he cannot gainsay the warranty, the stranger shall recover the land demanded against the voucher, and he shall recover as much other land against the vouchee of the lands he hath or had at the time of the voucher. And this recovery of other land is called a recovery in value. And if the vouchee hath at the time of the voucher and recovery no lands descended to him to answer the warranty, but hath afterwards land happening to him by descent from that ancestor, then he may have a summons and recover the land that doth after happen. But if the sheriff return upon the summons, that the vouchee is summoned, and he doth make default, then he shall have a *Magnum cape ad valentiam*; when if he make default again, the judgment shall be given against the voucher, and he shall recover over in value against the vouchee; and if the vouchee appear, and then make default, the voucher shall have a *parvum cape ad valentiam*; and then if he make default, judgement shall be given as before. But if the sheriff return upon the summons, he hath nothing whereby he may be summoned, then may the voucher have a writ called *Sequatur sub suo periculo*; whereupon shall go an *Alias* and *Pluries*; and if the like return be made, the demandant shall have judgement against the first tenant, but he cannot recover in value against the vouchee. And if the case be so, that the vouchee had a warranty from some other for the land, he may dearraigne, *i. e.* maintain the warranty over, and shall recover in value over also against his voucher in the same manner as before.

Of the warrantee to whom the warranty is made, or his heirs, may at any time before they be impleaded for the land, if they will, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs; and hereby all the land, the heir of the warrantor hath by descent from the ancestor that made the warranty, at the time of this writ brought, shall \* be bound and charged with the warranty, into whose hands soever it go afterwards; so that if the land warranted be after recovered from the warrantee, he shall recover so much land over again of the other land of the heir of the warrantor, or of the warrantor himself if he be living. And albeit the warrantee or his heirs do recover in this writ, yet he may after upon occasion vouch the warrantor or his heirs notwithstanding. And herein observe it is good policy, if a man suspect any thing, to bring this writ of *warrantia chartæ* betimes; because it binds all the land of the warrantor from the time of the writ brought, and not any of his other lands he had before that time that are now aliened (1).

The words *Dedi & concessi*, or *Dedi* only, in a feoffment do make a warranty, when an estate of frank-tenement or inheritance doth pass by the deed. But the word *concessi* only, or *demisi & concessi*, do not make such a warranty. And by force

(1) Upon what warranty this writ lies, by whom it may be had, and when, and how it was to be brought, see *Fin. Abr.* tit. *Warrantia Chartæ*. *Br. Abr.* same title. *Fitz. Nat. Brev.* 134. with notes to the last edition; and *Com. Dig.* Pleader (3 N).

Lit. Sect.

733.

Co. 5. 17.

18.

Dier 42.

Co. super

Lit. 383.

Co. super

Lit. 366.

389.

Co. super

Lit. 372.

385. Lit.

Sect. 738.

745. 706.

(1) See *M*

of that book,

(2) See acc

ranty (A) B

vol. 304.) ha

covenants for

bound to perfo

executors, and

formance of t

(3) But a p

his own and t

*Roll. Abr.* c

and *Stiles Pra*

(4) See fur

Warranty (B)



of the statute of *Bigamis chap. 6*, *Dedi* is made an express warranty during the life of the feoffor.

The word, *Warrantize*, or warranty, is the only apt and effectual word to make an express warranty, or a warranty in deed, and therefore this word only is used in fines. And the words *Defendo*, or *Acquieto*, albeit they be commonly used in deeds, yet of themselves without the other will not make a warranty (1).

If a man by deed doth grant to warrant land to *I. S.* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *I. S.* and his heirs, but to *I. S.* only; or doth warrant to *I. S.* and his assigns, and not to *I. S.* and his heirs; or doth bind himself and his heirs to warrant the land, but doth not say how long, nor against whom; these are good warranties, but how they shall be taken, see afterwards (2).

A warranty in deed may be annexed to estates of inheritance or freehold; and that not only of corporal things which pass by live-ry, as houses, lands, and the like, but also of incorporeal things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements; and that not only to inheritances in *esse*, but also to such as are newly created, as a man (some say) may grant a rent, *&c. de novo* out of land for life, in tail, or in fee, with warranty. So a warranty in law may extend to a rent newly created; and therefore if such a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed is good. But a warranty may not be annexed to an estate or lease for years, albeit it be a lease of one thousand years, nor to any other chattel, and therefore in all actions the which lessee for years may have as trespass, *&c.* a warranty cannot be pleaded in bar (3).

\* A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, *&c.* also a warranty may be made by and upon releases and confirmations, made to the tenant of the land, albeit he that makes the release or confirmation hath no right to the land, *&c.* And yet some say, that by a release or confirmation, where there is no estate created, or transmutation of the possession, a warranty cannot be made to the assignee. But if *A.* be seised of land in fee; and *B.* doth release to him, or doth confirm his estate in fee, with warranty to him, his heirs, and assigns; in this case all men agree this warranty to be good; and so also it seems it is in the case last before, and that both the party himself, and the assignee may vouch (4).

(1) See *Mad. Form. Angl.* 77. in p. 43. and for the forms of warranties, the references in the index of that book, under the word Warranty.

(2) See accordingly *Wood* 335: and further what words, or clauses make a warranty, *Com. Dig. Garranty* (A) *Bac. Abr. Warranty* (C.)—Warranties (says the learned author of the Commentaries in 2 vol. 304.) have, in modern practice, been totally superseded by covenants; because, if the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise; if he covenants only for his executors, and administrators, his personal assets, as well as his real, are likewise pledged for the performance of the covenant, which makes such a covenant a better security than a warranty.

(3) But a purchaser of goods and chattels may have a satisfaction from the vendor if he sells them as his own and the title proves deficient, tho' there is no express warranty for that purpose, *Cro. Jac.* 474. *1 Roll. Abr.* 90. See fully as to warranty of goods and chattels in *Bac. Abr. tit. Actions on the case* (E.) and *Stiles Prac. Reg.* 656.

(4) See further as to what things, and in what manner, warranties may be annexed, in *Bac. Abr. Warranty* (B.) *Vin. Abr. Voucher* (B. 6.) *Com. Dig. Garranty* (E).

6. What shall be a good warranty in law: and how it shall bar and bind.

A warranty in law may be good in its creation, albeit it be made without deed; for if a man by his last will and testament devise lands to another man for life, or in tail, rendering rent; to this estate there is a warranty in law annexed (1).

The words *Dedi & concessi*, or *Dedi* only in a feoffment, make a good warranty in law. But the word *Concessi* only in fine or feoffment, doth not make a warranty in law. And albeit there be an express warranty in the deed, yet this doth not take away the implied warranty of the law. And this warranty in law by *Dedi & Concessi*, or by *Dedi* only, is a general warranty during the life of the feoffor.

Partition.  
Exchange.

Every partition and exchange implieth in it, and hath annexed to it, a special warranty in law (2): how it shall bar and be extended, see in *Exchange*.

Every tenure by homage ancestrel, *i. e.* where a tenant and his ancestors have held land of a Lord and his ancestors, time out of mind by homage, hath a warranty in law annexed to it, by which the Lord is bound to warrant it to the tenant and his heirs.

If one make a gift in tail, or lease for life of land, by deed, or without deed, reserving a rent, or of a rent-service by deed; in these cases, there is annexed an implied warranty against the donor or lessor, his heirs and assigns.

When dower is assigned to a woman, there is a warranty in law included, which is, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable.

And this warranty in law is of the nature of a lineal warranty, and shall bind as a lineal warranty only, for it doth never bar any collateral title. And hence it is, that this warranty and assents in some cases is a good bar; as, if tenant in tail exchange for other lands which are descended to the issue, and he hath accepted of them, or if not, that other lands are descended to him. But if tenant in tail of lands, make a gift in tail, or lease for life, rendering rent, and \* die; in this case this is no bar. And yet if other assents in fee simple descend, this warranty in law and assents is a good bar (3).

\* P. 186.

7. What shall be said a good warranty in deed: or not: and how it shall bar and bind.

To every good warranty in deed, that must bar and bind, these things are requisite. 1. That the person that doth warrant, be a person able: for if an infant make a feoffment in fee of land, and thereby doth bind him and his heirs to warrant the land; in this case, albeit the feoffment be only voidable, yet the warranty is void.

2. That the warranty be made by deed in writing: for if a man make a feoffment by word, and by word bind him and his heirs to warrant the land; this is not a good warranty. So if a man give lands to another by his last will, and thereby bind him and his heirs to warrant it; this warranty, albeit the will be in writing, is void (4). 3. That there be some estate to which the warranty

(1) Warranties in law, are so called, because in judgment of law they amount to a warranty without the verb *Warrantum*. 1 Co. Lit. 384. a.

(2) See accordingly, 2 Roll. Abr. 739

(3) See more amply in what cases the law will create a warranty, *Vin. Abr. Voucher (A. 2.) Bar. Abr. Warranty (E).*

(4) Because a will in writing is no deed, and therefore an *express* warranty cannot be created by will; but a warranty in law may be created by will, and may bind the heir, though it never bound the ancestor. Co. Lit. 386. a.

Co. super  
Lit. 378.  
26 H. 8.

Co. super  
Lit. 12.  
Lit. fol.  
Sect. 73

Lit. fo. 11

Lit. Sect.  
737.

Co. super  
Lit. 387.  
Lit. Sect.  
718.

Lit. Sect.  
745- 746.

Co. 10. 96  
29. super  
Lit. 388.  
21 H. 7.

(1) Becu  
only accord

is annexed, that may support it: for if one covenant to warrant land to another and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these cases the warranty is void. 4. That the estate to which the warranty is annexed, be such an estate as is able to support it; and therefore that it be a lease for life at the least: for if one make a lease for years of land, and bind himself and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty: but this may amount to a covenant, on which an action of covenant may be brought. 5. That the warranty descend upon him that is heir of the whole blood by the common law to him that made the warranty, and not upon another: for if tenant in tail in borough English (where by custom the youngest son is to inherit) discontinue the tail, and have issue two sons, and the uncle release to the discontinuee with warranty, and dieth; this is no good warranty to bind the younger son (1). So if in this case, tenant in tail discontinue the tail with warranty, &c. having two sons, and die seised of other lands in the same borough in fee simple, to the value of the lands in tail; the younger son is not barred by this warranty. So if one give his land to the eldest son, and the heirs males of his body, the remainder to the second son, &c. and the eldest son doth alien with warranty, having issue a daughter, and die; this is no good warranty to bar the second son. So if tenant in tail have issue two daughters by divers venters and die, and they enter and a stranger doth disseise them, and one of them doth release all her right, and bind her and her heirs to warrant it; in this case the warranty is not good to bar the sister: but if they had been by one venter, *contra*. So if two brothers be by demy venters, and the eldest doth release with warranty to the disseisor of the uncle, and dieth without issue, and the younger dieth; this is no good warranty to bar the younger brother, for a warranty must evermore descend upon him that is heir at the common law to him that made it. 6. That he that is heir do continue to be so, and that neither the descent of the title, nor the warranty, be interrupted: for if one bind him and his heirs to warranty, and after is attainted of treason or felony, and die; this warranty doth not bind his heirs. So if tenant in tail be disseised, and after release to the disseisor with warranty, and after the tenant in tail is attainted of felony, and hath issue and die; this warranty will not bind the issue. 7. That the estate of freehold that is to be barred be put to a right before, or at the time of the warranty made; and that he to whom the warranty doth descend, have then but a right to the land: for a warranty will not bar any estate of freehold or inheritance in *esse* in possession, reversion, or remainder, that is not displaced, and put to a right, before, or at the time of the warranty made; though after, at the time of the descent of the warranty, the estate of freehold or inheritance be displaced and divested. And therefore if there be father and son, and the son hath a rent-service, suit to a mill, rent-charge, rent-seck, common of pasture, or other profit appender out of land of the father, and the father maketh a fe-

(1) Because a warranty cannot go according to the nature of the tenements by the custom, &c. but only according to the form of the common law. *Lit. Ject.* 735.



offment in fee with warranty, and dieth, this shall not bar the son of the rent, common, &c. And albeit the son after the feoffment with warranty, and before the death of the father had been disseised, and so, being out of possession, the warranty had descended upon him, yet this warranty should not bind him. So if my collateral ancestor release to my tenant for life, with warranty, and die, and this warranty descend upon me; this shall not bind my reversion, or remainder. But if in the case before, the son be disseised of the rent, &c. and affirm himself to be disseised by the bringing of an attise, (for otherwise he shall not be said to be out of possession of a rent, or the like) and after the father doth release with warranty and die; in this case the collateral warranty shall bind and bar the son of his rent, &c. And if in the last case, my tenant for life be disseised, and my ancestor doth release to the disseisor with warranty, and die; this is a good warranty to bar and bind me. 8. That the warranty doth take effect in life time Lit. Sect. of the ancestor, and that he be bound by it: for the heir shall 734 never be bound by an express warranty; but where the ancestor was bound by the same warranty, and therefore a warranty made by will, is void. 9. That the heir claim in the same right that the ancestor doth: for if one be a successor only in case of a corporation, he shall not be bound by the warranty of a natural ancestor (1). 10. That the heir that is to be barred by the warranty, Lit. Sect. be of full age at the time of the fall of the warranty: for if my 726. Co. 1. ancestor make a feoffment, or a release with warranty, and at this 67. 140. time I am within age, \* and after he die, and the warranty descend upon me within age; this warranty shall not bind me: but if I become of age after the warranty of my ancestor, and before his death; in this case the warranty may bar me. And in the first case it will bar me also, while it is in force; but I may by my entry avoid it. And the same law is of a woman covert. And yet if the entry of an infant, or a woman covert, be not lawful, when the warranty doth descend; in this case the warranty shall bind them as well as any other; for such warranty cannot be avoided but by entry and avoiding the estate. And where the husband is within age at the time of the descent of a warranty to his wife, and the entry of the wife is taken away, there the warranty shall bind the wife.

If lands be given to A. for life, and after to the next heir male of A. and the heirs male of the body of that heir male, and A. having issue B. makes a feoffment of the land with warranty to I. S. this is a good warranty and a bar to the issue; for a man may be barred of his right by a warranty which he could never avoid: as, where lessee for life is disseised, and a collateral ancestor of the lessor doth release to the disseisor with warranty and die, and this doth descend upon the lessor; by this he is barred.

A warranty made for life, or in tail, is good, and shall bind for so long only; as if tenant in tail of land let it for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of the tenant for life, and die, and the tenant in tail hath issue; this is a bar to the issue during the life of

(1) The warranty of the predecessor doth not bind the successor, 2 Inst. 155.

6 Litt 386 a

\* P. 188

the warranty is  
contingent & is  
barred by the  
disseisor's will  
to warranty. &

inf. Ancestor's case  
rem. to the wife  
near to y<sup>e</sup> heir male

Chap:

Co. 10.

Co. 8. 51  
super Lit.  
373.

Co. 5. 7

Co. super  
Lit. 370.

Lit. Sect.  
726. Co. 1.  
67. 140.  
super Lit.  
380.

Co. 1. 6

Co. super  
Lit. 366.  
365. Co.  
67. Stat.  
Glouc. ch.  
6. Lit. Se.  
724, 725.

Stat. 11 H  
chap. 20.  
Lit. Sect.  
727 Co.  
super Lit.  
365.

Co. 3. 58

the tenant for life. And in this case upon a voucher the recovery in value shall be put for life only.

Co. 10. 96. If one make a gift in tail, and grant to warrant the land given according to the gift; this warranty is good no longer than the estate doth last. And no warranty that a donor can make, in this case, can bar him of the land, if the donee die without issue, and the estate determine.

Co. 8. 52.  
super Lit.  
373.

And where a warranty doth bar, it is entire, and doth extend to all the land, and to all persons, upon whom it doth descend, and is a bar of all the right that every one of them hath in the land; so that if they have all right jointly or severally, or one only hath all the right and the rest none, he that hath the right is barred. And therefore if lands be given to *A.* and the heirs of his body, and for want of such issue to *E.* his sister and the heirs of her body, and *A.* doth make a feoffment with warranty, and die without issue, having two sisters *E.* and *S.* this is a bar to *E.* for the whole, albeit the warranty descend on her and another.

Co. 5. 79. If there be tenant for life, the remainder to his son and heir apparent in tail, and the father doth make a feoffment in fee with warranty and dieth; in this case this is a good warranty, and will bar the son, albeit it be made of purpose to bar him. But if by agreement and covin between him and *A.* and *B.* he make a lease to *A.* who makes a feoffment in fee to *B.* to whom the father doth release with warranty, thinking by a collateral warranty to bar his son; this is no bar, for this warranty began by disseisin: and if in the first case the son doth enter in the life time of the father upon the land, he doth avoid the warranty. \* P. 189.

Co. 1. 66. If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of such next heir male, and the father makes a feoffment to *I. S.* with warranty and dieth; it seems this warranty is a good bar to the heir; and in this case the heir cannot enter in the life time of his father, for he cannot be heir male unto his father until his father's death.

Co. super Lit. 366.  
365. Co. 1.  
67. Stat.  
Glouc. ch.  
6. Lit. Sect.  
724, 725.  
Stat. 11 H. 7.  
chap. 20.  
Lit. Sect.  
727 Co.  
super Lit.  
365.  
Co. 3. 58.  
the

If tenant for life make a feoffment with warranty, or be disseised, and release with warranty, and he in reversion, being heir to the tenant for life, doth not enter, but suffer the lessee for life to die, and thereby the warranty to fall and descend upon him; in this case, this warranty generally is a bar without any assets. But if he that doth so alien, &c. be tenant by the courtesy, this is no bar to the heir, without assets in fee-simple from the tenant by the courtesy, and then it is a bar for so much. And if the heir, for want of this assets at the time, doth recover the land from his mother, and after assets doth descend from the father; in this case the tenant shall recover the same land of the mother again. And if she that doth so alien, &c. be tenant for life of the inheritance or purchase of her deceased husband, or given unto her by any of the ancestors of her husband, or by any other person seised to the use of her husband, or of any of his ancestors; in this case, her alienation, release, or confirmation with warranty, shall not bind the heir whether he have assets or not. But if a man convey lands to the use of himself, *B.* his wife, and the heirs of his body, and they have issue *C.* and the father dieth, and *C.* disseiseth his mother, or getteth a feoffment from a dis-

a disseisor, and then suffereth a recovery with a single voucher, and after the mother doth release to the recoverer with warranty; in this case the warranty is a bar to the issue, and not void by the statute of 11 H. 7.

If the husband that is seised of lands in the right of his wife levy a fine, or maketh a feoffment in fee with warranty, and the wife dieth, and then the husband dieth; this warranty shall not bind the heir of the wife without assents of other land in fee-simple from the father, albeit he be not tenant by the courtesy, but it is before her death that he doth make the estate and the warranty. But a fine levied by the husband and wife, in this case, is a good bar to the heir.

• P. 190.  
Fine.

• If tenant in tail that is in of another estate, i. e. either by disseisin, or by the feoffment of a disseisor, doth suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoverer, and after the recoverer doth make a feoffment to uses executed by the statute of 27 H. 8. and after the collateral ancestor dieth; in this case albeit the estate of the land be transferred in the post before the descent of the warranty, yet it shall bind. So if he to whom the warranty is made suffer a common recovery, and after the ancestor dieth. But if tenant in dower enfeoff a villain with warranty, and the Lord of the villain enter into the land before the descent of the warranty, and after the woman dieth; this warranty shall not bind the right of the heir. So if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the Lord by escheat doth enter, and after the ancestor dieth; this warranty shall not bind.

A collateral warranty may descend upon an issue in tail before the right descend, and yet be good, with this difference, that the right be in esse in some of the ancestors of the heir at the time of the descent of the warranty; as if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth all his right, &c. to the disseisor with warranty, and dieth without issue, and the tenant in tail hath issue and dieth; in this case the issue is barred. But otherwise it is where the right is not in esse in the heir, or any of his ancestors, at the time of the fall of the warranty; as if Lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffment doth purchase the seignior, and after the tenant doth cease, in this case the Lord shall have a cessavit; for a warranty doth never bar any right, that doth commence after the warranty (1).

8. What shall be said a lineal warranty; and how such a warranty shall bar.

If the case be so that if no such warranty had been made by the father or other ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same ancestor, and that from and by him that made the same warranty, such a warranty is a lineal warranty (2).

(1) See accordingly in 1 Wood 335 to 338, and further what shall be said a good warranty in deed, and who shall be bound by it, in Com. Dig. Warranty (B.) Vin. Abr. Voucher (B. 2.) Bac. Abr. Warranty (D.)

(2) Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted either from or thro' the ancestor who made the warranty; as, where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather with warranty, this was lineal to the younger son. 2 Bl. Com. 301.—Warranty lineal is where a man seised in fee, or in tail, makes a feoffment to another, and binds him and his heirs to warranty, and hath issue a son, and dieth, and the warranty descends to the son. Curzon's Law of Estates Tail. 269.



Co. super  
Lit. 371.Lit. Sect.  
707.

Co. 1. 66. 67.

Co. 8. 52.  
New terms  
of the law  
tit. War-  
ranty.Lit. Sect.  
719.Lit. Sect.  
714.Co. super  
Lit. 375.Lit. Sect.  
718.

As if a man be seised in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath issue and die, and the warranty doth descend upon the issue; this is a lineal warranty, for that, if none such had been, the right of the land had descended to him as heir to his father, and he must have made his descent by him. And if there be grand father, father and son, and the grand-father be disseised, and the father release to the disseisor being in possession with warranty, &c. and dieth, and after the grand-father dieth; this is a lineal warranty to the son, and albeit in this case the warranty descend \* before the right, yet it is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the younger son; this is a lineal warranty to him. And if lands be given to A. for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty. And if two parcenours be, and the eldest enter into all the land to her own use, and then doth make a feoffment with warranty and dieth without issue; this as to her own part is a lineal warranty, but as to her sister's part is a collateral warranty. And in every case where one doth demand an estate tail, if any ancestor of the issue in tail, whether he had possession of the land or not, hath made a warranty, and if the issue, that were to bring a writ of formedon, may or might have, by possibility of some matter that might have been done, conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be seised of land of an estate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty descending upon the issue is a lineal warranty (1). And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath issue a son and a daughter and dieth; this warranty is lineal to the son, and if the son die without issue male, it is a lineal warranty from the father to the daughter. But if the brother in his life time release to the discontinuee, &c. with warranty, &c. and after dieth without issue; this is a collateral warranty to the daughter. If lands be given to the husband and wife, and the heirs of their two bodies engendred, and they have issue, and the husband discontinue and die, and after the wife doth release with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the land. And if tenant in tail have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is a

*heretofore  
discontinuing is by  
the father  
in the entry*

*son should  
die without  
issue generally*

(1) Lineal warranty is that which is made by tenant in tail, collateral that which is made by a stranger to the entail.—see further in *Sull. ject.* 165.

*Litt. 8. 718*  
*sees this is no collateral warranty*  
 lineal warranty to him. And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty to the second son. And in all these cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee-simple, it is a bar without any assents; for the rule is, that as to him that demandeth fee-simple by any of his ancestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained by some statute. But it doth not bind the right of an estate in fee-tail without assents, for in that case the rule is, that as to him that demandeth fee-tail by writ of formedon in the descender, he shall not be barred by a lineal warranty, unless he hath assents by descent in fee-simple of other land from the same ancestor that made the warranty; and then it is a bar for so much only as doth descend to him no more. And yet if the issue in tail do alien the assents descended and die; in this case the issue of that issue is not barred by this warranty and assents. But if the issue, to whom the warranty doth descend, bring his writ of formedon, and is barred by judgement by reason of the warranty and assents; in this case albeit he alien the assents afterwards, yet the estate tail is barred for ever (1).

9. What shall be said a collateral warranty: and how such a warranty shall bar.

If tenant for life do alien in fee with warranty, or be disseised and release to the disseisor with warranty and die, and the warranty descend on him in reversion or remainder; this is a collateral warranty (2). So if the lessee for life be disseised, and a collateral ancestor of him in reversion, release with warranty and die, and the warranty descend on him in reversion; this is a collateral warranty, for that is collateral which is collateral to the title of the land. And if a man seised of lands in fee have issue two sons, and the father dieth, and the younger son doth enter, and doth alien the land with warranty, and die without issue; this is now a collateral warranty that is descended on the elder brother. And if a son be disseised of his own land, and bring an assise, and after the father doth release to the disseisor with warranty and dieth; this warranty that doth descend to the son is a collateral warranty. And if a father disseise his son of the land he hath of his own purchase, without any intent to alien afterwards and to bar his son, and afterwards he doth make a feoffment with warranty and die before the entry of his son, so that the warranty doth descend; this is a collateral warranty. If there be father and two sons,

(1) See further what may be deemed a lineal warranty, and how it shall bind, in *Bac. Abr. Warranty* (F.) *Com. Dig. Garranty* (H.) *Vin. Abr. Voucher* (W. b.) to (A. c.)

(2) Collateral warranty was where the heirs title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor with warranty, this was collateral to his elder brother, 2 *Bl. Com.* 302.—No reason can be given for a collateral warranty, *per cur.* 4 *Mod.* 211.—but *Holt Ch. J.* said that the true reason of collateral warranty was the security of purchasers, and for their encouragement; as also for the establishing and settling the estates of such as were in by title, or descent cast; and this was the only security such persons could have at common law. And because the estates of such persons, as are in by title, are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days there was no need of a lineal warranty; but however the force of that is taken away by the statute of *Donis*; and common recovery is not upon the supposition of recompence in value, and never was within the statute; but always as much out of it as if it were so mentioned by express words. And this he said was my *Ld. Hale's* opinion. 12 *Mod.* 512.—See further as to the reason and doctrine of collateral warranty in *Lull, Sect.* 121. 164. 2 *Inft.* 335. *Wright's Ten.* 168.

and

Co. Super  
Lit. 388.Co. 10. 96.  
Lit. Sect.  
709.  
Plow. 234.  
Kelw. 78.Lit. Sect.  
708.Lit. Sect.  
716.Co. 8. 52.  
Lit. Sect.  
713.Lit. Sect.  
711.

and the father is disseised, and the younger son doth release with warranty to the disseisor, and die without issue, and then the father dieth; in this case, the warranty now descended is a collateral warranty. If a lease be made for life to the father, the remainder to his next heir, and the father is disseised, and doth release with warranty and dieth; this is a collateral warranty to the heir. And if the husband discontinue \* the right of his wife, and ancestor collateral to the wife to whom she is heir doth release with warranty and die, and after the husband dieth; this is a collateral warranty and a bar to her. And in every case where a man doth demand an estate tail by a writ of formedon, if any ancestor of the issue in tail, which hath, or hath not possession, maketh a warranty, and the issue that is demandant cannot by any possibility that may be done, convey to him a title by force of the gift, from and by him that made the warranty; this is a collateral warranty: as if tenant in tail discontinue the tail and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in tail; this is a collateral warranty. So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. If a tenant in tail have three sons, and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in tail dieth; this is a collateral warranty to the elder brother. If one have issue three sons, and giveth land to the eldest, and the heirs of his body, and for want of such issue to the middle, and the heirs of his body, the remainder to the third, and the heirs of his body, and the eldest doth discontinue the tail in fee with warranty, and die without issue; this is collateral to the middle son. In the same manner it is in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance, but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collateral warranty to the youngest son. And in this case if any of the sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend. If lands be given to *A* and the heirs of his body, and for want of such issue to *E*. his sister, and the heirs of her body, and *A*. doth make a feoffment with warranty, and die without issue, having two sisters, *E*. and *S*; this is a collateral warranty to *E*. If lands be given to a man and the heirs of his body begotten, who taketh a wife and hath issue a son by her, and the husband doth discontinue the tail in fee and dieth, and after the wife doth release to the discontinuee with warranty and dieth, and the warranty doth descend to the son; this is collateral to him. If tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail doth release to the disseisor with warranty in fee, and dieth without \* issue, and the tenant in tail hath issue and dieth; this is \* P. 194. collateral as to the issue. If tenant in tail have issue two daughters,



daughters, and die, and the elder enter into all to her own use, and thereof make a feoffment in fee with warranty, and die without issue, this warranty as to the other sisters part is collateral, but not as to her own. If the husband and wife, tenants in special tail, have issue a daughter, and the wife die, and the husband by a second wife have issue another daughter, and discontinueth in fee and dieth, and a collateral ancestor of the daughters release to the discontinuee with warranty and dieth, and the warranty descend upon both the daughters, this is a collateral warranty to them. If lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the father die, and the brother release with warranty, and die without issue; this is collateral to the daughter. If tenant in tail make a lease for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of tenant for life with warranty and die, and after the tenant in tail die, having issue; this is a good binding collateral warranty during the estate for life. And in all these and such like cases of a collateral warranty, whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a bar without any assents; for in this case the rule is, that a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee tail, without any other descent of lands in fee simple; so that the heir on whom the same warranty is descended, can never have the land so warranted, whilst the warranty doth continue in force, but is bound thereby, except it be in some special cases restrained by Act of Parliament; as where the husband alone during his wife's life, or after her death, being tenant by the curtesy, make a feoffment by fine, or deed, of his wife's land, which she hath by descent or purchase, with warranty; this will not bar her heir without assents of other lands in fee simple descended from the same ancestor that made the warranty. Or where a wife after her husband's death, shall alone, or with her succeeding husband alien, release, confirm, or discontinue with warranty, the land she holdeth in dower, or in tail, of the gift of her former husband, or any of his ancestors; this warranty is voidable, and will not bind with assents (1). If the son purchase land, &c. and after let it to his father, or any other ancestor for years, or at will, and he by his deed doth infeoff a stranger, and that with warranty, and after dieth, whereby the warranty doth descend upon the heir; this war-

Co. super  
Lit. 373.Lit. Sect.  
738.Lit. Sect.  
712.  
Co. super  
Lit. 374.  
Co. 10. 96.  
Stat. of  
Glouc. ch. 3.  
Co. super  
Lit. 365.  
Stat. 11. H.  
7. chap. 10.Co. s. 80.  
super Lit.  
366, 367.

10. What shall be said a warranty that doth begin by disseisin: and what such a warranty doth work.

Lit. Sect.  
699, 700.  
701, 702.  
Finch 82.  
Co. super  
Lit. 367.

(1) Such warranty by is the statute 11 H. 7. c. 20. made absolutely void.—and by the stat. 4 Ann. c. 16. § 21. It is enacted “ That all warranties which shall be made after the first day of Trinity Term 1705, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of no effect; and likewise all collateral warranties which shall be made after the said Trinity Term, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir.”—It is a common mistake, that all collateral warranties are taken away by the Statute 4 & 5 Ann. c. 16. whereas that statute only makes void all warranties by tenant for life, and all collateral warranties made by any ancestor, not having an estate of inheritance in possession: So that if A. be tenant in tail, remainder to B. his next brother (which is a very common case, arising almost on every marriage settlement) and A. being in possession makes a feoffment, or levies a fine with warranty from him and his heirs, and die without issue, this is a collateral warranty, (for B.'s title is by way of remainder, to which his elder brother is collateral) which shall bar B. notwithstanding the statute, tho' no assents descend. *et sic de similibus.* *Robinson* on Gavelk. 125. As to the operation of the statute of Ann. see *Hazak. Abr. Co. Lit.* 7th edit. 468, 476. and further as to collateral warranty, and in what cases it shall bar, in *Com. Dig. Warranty* (H. 2.) (H. 5.) *Bac. Abr. Warranty* (H.) *Vin. Abr. Voucher* (U. b. 3.)

rarity

(1) An consent, father shall not bind, seisin to t  
Abr. Vou

ranty doth commence by disseisin. So if tenant by elegit, statute merchant, guardian in chivalry, or socage, or because of \* nurture, make a feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one coparcener enter into the whole land, and make a feoffment in fee with warranty; this warranty as to the one moiety doth begin by disseisin. So if father and son purchase lands to them jointly, &c. and the father alien the whole to another with warranty, &c. and after the father dieth; this warranty as to the one moiety doth begin by disseisin. But if the purchase be to them two and the heirs of the son it is otherwise, for if the son enter in the life time of the father, the warranty is ~~avoided~~ <sup>avoided</sup> for all, but if he do not enter, then as to the father's moiety it is a collateral warranty. And if the purchase be to the father and son, and the heirs of the father, and the father alien with warranty, &c. in this case the warranty is good for the whole.

Co. 5. 80.  
super Lit.  
366, 367.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent, of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the lessee should make a feoffment in fee, that the father may release to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth descend to the son; in this case, the warranty shall be said to begin by disseisin. But if the father in this case make a feoffment in fee with warranty and die; this is a good warranty to bind the son, albeit it is done of purpose to bar him. So if one brother make a gift in tail to another, and the uncle doth disseise the donee, and infeofeth another with warranty, the uncle dieth, and the warranty descendeth on the donor, and then the donee dieth without issue; this warranty doth begin by disseisin. So if the father and son and a third person be jointenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the son dieth; in this case, as to the part of the third person and to the part of son, the warranty shall be said to begin by disseisin. But releases at this day by a tenant for life, to a disseisor, or any other, without covin, albeit it be to the intent to bar him in reversion, shall bar him; for intent, without covin and disseisin, shall not avoid a warranty: and examples of warranties that do begin by disseisin, have these qualities: 1. That for the most part the disseisin is done immediately to the heir that is bound by the warranty (1). 2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty that doth begin by disseisin. But in all these cases of warranties that do begin by disseisin, this is the rule, that \* they are altogether void \* P. 196.

(1) And yet if the father be tenant for life, the remainder to the son in fee: the father, by covin and consent, makes a lease for years, to the end that the lessee shall make a feoffment in fee, to whom the father shall release with warranty; and all is executed accordingly; the father dies; this warranty shall not bind, albeit the disseisin was not done immediately to the son; for the feoffment of the lessee is a disseisin to the father, who is *particeps Criminis*. Co. Lit. 366. b.—See accordingly and further in *Vin. d. r. Voucher* (B. 4.) pl. 7. in margin where cases are collected to support this point of doctrine.

and without force as to all others but to the parties themselves that do make them; and therefore they do not bar or bind any others at all of their right that have any. And the same law is of a warranty that doth begin by abatement or intrusion; that is, when an abatement or intrusion is made of purpose to make a feoffment in fee with warranty. And so also it is where the tenant dieth without heir, and an ancestor of the Lord doth enter before the entry of the Lord, and make a feoffment in fee with warranty; in this case this shall not bind the Lord, because it doth begin by wrong (1).

11. How a warranty shall be taken.

All warranties in general are favourably taken in law, because they are part of men's assurances. Every warranty in law is taken for, and hath the effect of, a lineal warranty.

The warranty that is made by *Dedi & Concessi*, or *Dedi* only Co. 4. 81. in a feoffment, is, and shall be taken for, a general warranty 5. 17. against all persons to the feoffee and his heirs, during the life of the feoffor only, albeit there be no service reserved by the deed nor heir named: but it shall not extend to the assignee of the feoffee. And if there be any service reserved on the deed, then it shall extend against the heir also.

The warranty in law that is made upon a gift in tail, or lease for life, rendring rent, is a special warranty against the donor and lessor, and his heirs and assigns; so that the donee or lessee may vouch the grantor after the grant of the reversion, or the grantee of the reversion after the attornment of the tenant, at his election. Co. 4. 81. super Lit. 384.

The warranty in law that is made upon an exchange, is special in divers respects; for it extendeth reciprocally to, and against, the heirs of both parties; and it doth extend only to the same land that is given in exchange, and none other; and no use can be made of it but by voucher, for no *warrantia chartæ* doth lie upon it. So also the warranty, that is made in dower, is taken to extend only to the other two parts of the land. Co. 4. 111. super Lit. 384.

The warranty in law, that is made upon the tenure of homage ancestor, extendeth reciprocally to the heirs, and against the heirs, of both parties. Co. super Lit. 384.

If a feoffment be made of land to three jointly, and the feoffors do warrant the land to the feoffees, and every of them; this warranty shall be joint and not several. But if the estate be several, as if one grant white acre to *A.* and black acre to *B.* and grant to warrant the land to them, and either of them; in this case the warranty shall be several. Co. 5. 59.

If a man of full age, and an infant join in a feoffment with warranty; this shall be taken for a good warranty as to the whole for him that is of full age and void for the infant, and not void in part and good in part. Co. super Lit. 367.

\* P. 197. If a man make a feoffment in fee, and bind his heirs but not himself to warranty; in this case and by this, his heirs shall not be bound, and it seems also that it will not bind the warrantor himself. But if a man bind himself to warrant, and not his heirs, by the feoffment; in this case the feoffor himself is bound to the warranty, but not his heirs; for it is a maxim of law, that the heir shall never be bound to any express war- Co. super Lit. 386. Lit. 47. 385. Dier 42. Kelw. 108. Co. 6. 69.

(1) See more amply what shall be deemed warranty which commences by disseisin, abatement, or intrusion, and their operation, in *Bac. Abr. Warranty (K.)* *Com. Dig. Garranty (I. c.)*



ranty, but where the ancestor was bound by the same warranty. If one make a feoffment to *B.* and his heirs, and thereby doth grant to warrant the land, and doth not say to *B.* and his heirs; yet this warranty shall be taken to extend to them. But if the feoffor doth grant to warrant the land to *B.* and doth not say to his heirs, this shall not extend to his heirs. And if in this case the warranty be to *B.* and his assigns, this shall not extend to his heirs, neither shall the assignees take advantage of it after the death of *B.* And if the warranty be to *B.* and his heirs, and not to his assigns also; this shall not extend to his assigns. If one make a feoffment to *A. habendum* to him and his heirs, and bind himself and his heirs to warrant the land *in forma prædicta*; in this case the warranty shall extend to the feoffee and his heirs (1).

Co. 1. 1. If one grant to warrant land to another and his heirs, and doth not say against what persons, this shall be taken for a general warranty against all men.

If one make an estate and grant to warrant the land, but doth not say how long, this shall be taken for as long as the estate to which the warranty is knit doth last.

Dier 328. If a warranty be made against any special persons, it shall extend to them and no further; and it shall extend in all cases for and to all titles and entries upon title; and it shall not in any such cases extend to tortious and unlawful entries.

Co. super Lit. 366. If a man be seised of a rent-fee, issuing out of the manor of *Dale*, and he take a wife, and the husband doth release to the terre-tenant, and warranteth *tenementa prædicta* and dieth; this warranty shall extend to the rent, as well as to the land; and therefore if the wife sue for her thirds of the rent, the terre-tenant may vouch the heir. And regularly the warranty doth extend to all things issuing out of the land, *vis.* to warrant it in the same manner and plight as it was in the hands of the feoffor, and he shall vouch as of lands discharged. And therefore if grantee of a rent, grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty; in this case the warranty shall not extend to the rent, albeit the feoffment be made of the land discharged of the rent. And if a woman have a rent-charge in fee, and she doth intermarry with the tenant of the land, and a stranger doth release to the tenant of the land with warranty; this warranty shall not extend to bar any action to be brought after the death of the wife for the rent. But if in this case the \* tenant make a feoffment in fee with warranty \* P. 198.

(1) In the case of *Williamson v. Codrington* in 1 Ves. 511. Sir *W. C.* made a voluntary settlement of a plantation in *America*, with a clause, whereby he obliged himself, his heirs, executors, and administrators, to warrant and for ever defend the plantation, negroes, cattle, stock, &c.—The word *warrant*, when properly applied, has to be sure a particular sense; but has in general a further sense: therefore it is not necessary to understand *warranty* in a deed or covenant barely as a warranty of the title to the realty; But it shall be taken *secundum subjectam materiam*. Here are chattles to be warranted in this deed; some of which are certainly personal things, as cattle, horses, &c. though negroes in some instances are considered as annexed to the plantation. Then there are words binding his executors, and administrators; which must be rejected, if to be construed as a mere real warranty of the land. This clause therefore is inconsistent with that narrow construction: nor is it penned as a real warranty: which is, "I do for my self and my heirs warrant such land;" here the words are, "I do oblige," &c. which amounts to the same as, "I covenant," &c. for many other words in a deed will amount to a covenant besides the word *covenant*; as "I oblige, agree." This then is barely a covenant for himself, his heirs, executors, and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense, as large as defend. That construction a court of law or equity must put on it. *per* *Ld. Hardwicke*, 1 Ves. 516.

and dieth, the feoffee in a *cui in vita* brought by the wife shall vouch as of lands discharged at the time of the warranty made. So if tenant in tail of a rent-charge purchase the land and make a feoffment with warranty, and the issue bring a formedon of the rent, the tenant shall not vouch, &c. (1)

12. Who may take advantage of a warranty; and how and against whom it may be taken.

Assignees.

All those that are parties to the warranty, *i. e.* such as are named in the deed regularly, shall take advantage of the warranty: as if one doth warrant land to another, his heirs, and assigns; in this case both the heirs and the assigns may take advantage of it, and they both may vouch or rebut, or have a *warrantia chartæ*, so as they come in in privy of estate; for otherwise the heirs or assigns cannot vouch, or have a *warrantia chartæ*; and yet they may rebut, notwithstanding, in divers cases. But those that are not named, for the most part, shall not take advantage of the warranty: and therefore if land be warranted to *I. S.* and not to him and his heirs, or to him and his assigns, or to him, his heirs and assigns; in these cases neither the heir nor the assignee may vouch or have a *warrantia chartæ*; and yet in some cases where it is so, the assignee or tenant of the land may rebut.

Co. super  
Lit. 385.  
5. 17.

The warranty annexed to an exchange, a partition, by *Dedi*, and by homage ancestrel, doth always go in privy; and therefore an assignee in these cases can take no advantage of it. And yet in the cases of exchange and *Dedi*, an assignee may rebut. But the assignee of a lessee for life may take advantage of the warranty in law annexed to his estate.

Co. super  
Lit. 384.

If one grant to warrant land to another, his heirs and assigns; in this case the heirs, or assigns, heir of the assignee, or assignee of the heirs of the feoffee, or assignees of assignees *in infinitum*, shall take advantage of the warranty. And therefore if one infeoff *I. S.* to have and to hold to him, his heirs and assigns, and warrant the land to him, his heirs and assigns, and *A.* doth infeoff *B.* and his heirs, and *B.* dieth; in this case the heir of *B.* shall vouch as assignee to *A.* And if one infeoff *A.* and *B.* *Habendum* to them and their heirs, and warrant the land to them, their heirs and assigns, and *A.* die, and *B.* doth survive and die, and his heir infeoff *C.* in this case *C.* shall take advantage of this warranty as assignee. If one infeoff *A.* with warranty to him, his heirs and assigns, and *A.* doth infeoff *B.* and *B.* doth reinfeoff *A.* In this case neither *A.* nor his assigns shall ever take any advantage of this warranty. And yet if *B.* infeoff the heir of *A.* he may take advantage of the warranty.

Co. 5. 17.  
super Lit.  
384, 385.

If one make a feoffment by deed with warranty to the feoffee, his heirs and assigns, and the feoffee doth make a feoffment over to another by word without deed; in this case the second feoffee shall \* have all the advantage of this warranty, for an assignee by word shall have the same advantage that an assignee by deed shall have.

\* P. 199.

If a feoffment be made with warranty to a man and his heirs and assigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee; this feoffee shall not

Co. super  
Lit. 385.

Co. super  
Lit. 384.

Co. super  
Lit. 390.

26 H. 8. 3.  
22 Aff. pl.  
37. 29 Aff.  
34.  
Co. 3. 62.  
63.

(1) See further as to the operation of warranties, what rights and titles are barred by them, and how they shall be expounded and taken, in *Vin Abr. Voucher* (B. 7.) *Bar. Abr. Warranty* (F.) *Com. Dig. Warranty* (F.)

vouch as assignee, but he must vouch his donor upon the warranty in law; and yet he may rebut.

If lands be given to two brethren in fee simple, with warranty to the eldest and his heirs, and the eldest dies without issue; in this case, albeit the other brother be his heir, yet he shall have no advantage at all by the warranty, because he comes in above the warranty. But generally all that claim under the warranty shall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two their heirs and assigns, and one of them doth make a feoffment in fee, this feoffee in this case shall not take advantage as assignee.

Co. super  
Lit. 385.

An assignee of part of the land shall take advantage of a warranty, as if a man make a feoffment of two acres with warranty to him, his heirs and assigns, and the feoffee doth make a feoffment of one acre of it to another; in this case the second feoffee shall take advantage of the warranty as assignee. And therefore herein there is a difference between the whole estate in part, and part of the estate in the whole or in any part: for if a man have a warranty to him, his heirs and assigns, and he make a lease for life, or gift in tail; in these cases the lessee or donee shall not take advantage of the warranty as assigns: but they may vouch the lessor, or donor, upon the warranty in law. But if a lease for life be made; the remainder in fee; such a lessee may vouch as assignee upon the first warranty. If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his son and heir with warranty, in this case the son may take advantage of the first warranty after his father's death. If a man infeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the husband the wife is received; in this case she may vouch her husband. *Et sic e converso*. If a woman infeoff a man with warranty, and they intermarry and are impleaded; the husband in this case shall vouch himself and the wife.

Co. super  
Lit. 384.

Co. super  
Lit. 390.

26 H. 8. 3.  
21 Aff. pl.  
37. 29 Aff.  
34.  
Co. 3. 62.  
63.

He that comes into the land merely by act of law in the post, as the Lord by escheat, or the like, shall never take advantage of a warranty: and therefore if tenant in dower infeoff a villain with warranty, and the Lord of the villain enter; or a feoffment be to a bastard with warranty, and he die without issue, and the Lord enter by escheat; in these cases the Lord shall never take advantage of these warranties. But otherwise it is where a man comes to the land by limitation of use, or a common recovery, which is by the act of the party: for if tenant in tail, being in of another estate, *i. e.* by disseisin, or feoffment of a disseisor, suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses which are executed by the statute of 27 H. 8. and after the collateral ancestor dieth, in this case the terre-tenants may take advantage of the warranty by way of rebutter, albeit the estate be transferred in the post. So if he to whom the warranty is made, suffer a common recovery, and after the ancestor dieth; the recoveror may take advantage of this warranty by way of rebutter: for any man that hath the possession of land, albeit he have no deed to shew how he came by the possession of it, or how he is assignee, may rebut the demandant, and so

P. 200.



bar him, and defend his own possession: and therefore the ténant by the curtesy, donee in tail that is in of another estate, an assignee by force, of a warranty, made to a man and his heirs, or feoffee of a donee in tail, may rebut and bar the demandant by the warranty.

If one infeoff another of an acre of ground with warranty, and hath issue two sons, and dieth seised of another acre of land of the nature of borough English; in this case, albeit the warranty descend upon the eldest son only, yet both the sons may be vouched. And so also it is of heirs in gavelkind; the eldest shall be vouched as heir to the warranty, and the rest in respect of the inheritance (1). And in like sort the heir at the common law, and the heir of the part of the mother shall be vouched, or the heir at the common law may be vouched alone, at the election of the tenant. And in like sort the heir at the common law shall be vouched with the heir in borough English. And so also a bastard shall be vouched with a *mulier* (2). And if a man die seised of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son entreth and dieth, and the land doth descend to the sister; in this case the warranty doth descend on the son, and he may be vouched as heir, and the sister also may be vouched as heir to the land.

If two make a feoffment with warranty, and the one die, the survivor shall not be charged alone with the warranty, but the heir of him that is dead shall be charged also. And if two be bound to warrant land, and both of them die; the heirs of both of them ought to be vouched, and shall be equally charged. And if the heir be vouched in the ward of three several persons, the one of them only shall not be charged, but they shall be charged equally.

If a woman, an heir of the disseisor, infeoff me with warranty, and after she is married to the disseisee; in this case, I may take advantage of \* this warranty against the disseisee, and rebut him upon it, if he sue me for the land. So if the husband and wife sue me for the land of his wife, and I have a warranty of a collateral ancestor of the husband's descended to him; in this case I may make use of this to bar the husband and wife (3).

13. When a warranty shall be said to be defeated, determined, or avoided: and how: or not.

A warranty lineal or collateral may be defeated, determined, or avoided in all, or in part. And this is sometimes by matter in law, and sometimes by matter in deed.

If the estate to which the warranty is annexed be gone, the warranty annexed thereunto is gone also. And therefore if an

(1) Concerning warranties annexed to gavelkind lands, it is said generally in several books, that every warranty which descends, descends to him that is heir by the common law. *Co. Lit.* 12. a. 376. a. *Hib. 31 Cro. Jac.* 218. but for the better understanding this rule with the proper restrictions, *Mr. Robin/jn* in his treatise on gavelkind p. 123, considers the authorities which treat more distinctly of this matter, under three heads; first, whether the younger sons, heirs in gavelkind, may take advantage of a warranty annexed to their estate: 2. Whether they shall be barred or rebutted by the warranty of their ancestor: 3. Whether they may be vouched by reason of such warranty.

(2) The bastard may be vouched alone without the *mulier*, because the bastard is heir in appearance and shall not disable himself, *Co. Lit.* 376. b. Where a man has bastard *eigne & mulier puisne* and the bastard enters, a man shall vouch the *mulier* as heir at the common law, and shew how the bastard has entered into certain land of the father who made the warranty, and vouch him by the possession. *Br. Abr. Voucher.* pl. 119. cites 22 E. 4. 10. See further *Vin. Abr. Voucher* (U.)

(3) See accordingly and further who may take advantage of a warranty, against whom, and in what manner, in *Bac. Abr. Warranty* (N.) *Com. Dig. Warranty* (C.) (K.) *Vin. Abr. Voucher* (I.)

Co. super  
Lit. 392.

estate tail, to which a warranty is annexed, be spent, the warranty is determined. And if a man make a gift in tail with warranty, and after the donee doth make a feoffment, and die without issue, the warranty is gone. So if tenant in tail discontinue the tail, and the discontinuee be disseised, or make a feoffment on condition, and a collateral ancestor of the issue release to the disseisor or feoffee, on condition, with warranty, and after the discontinuee doth enter upon the disseisor, or on the feoffee for the condition broken; in these cases, the warranty made by the collateral ancestor is gone. So if a feignory be granted with warranty, and the tenancy escheat, so that the feignory is extinct; hereby also the warranty is defeated. So if a collateral ancestor heretofore had released with warranty, and then had entred into religion, this warranty had bound; but if after, he had been dearaigned, the warranty had been defeated.

Co. super  
Lit. 384.  
Bro. Gar-  
ranty, 27.

If the father make a feoffment to his son and heir apparent, with warranty, and die, so that the warranty doth descend upon the son; hereby the warranty is gone. And yet if a feoffment be made to a man and his heirs, and he dieth leaving issue daughters: in this case the warranty shall be divided, and is not determined.

Lit. Sect.  
743.  
Co. super  
Lit. 390.  
Lit. Sect.  
744.

If tenant in tail doth make a feoffment to his uncle, and after the uncle doth make a feoffment in fee with warranty, &c. to another, and after the feoffee of the uncle doth reinfeoff again the uncle, and after the uncle doth infeoff a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth; hereby the warranty made to the first feoffee is defeated. So if the uncle make the warranty to the feoffee, his heirs and assigns, and take back an estate in fee, and after doth infeoff another. But if one make a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee doth reinfeoff the feoffor and his wife, or the feoffor and a stranger; in these cases the warranty is not defeated, but doth continue still. So if two do make a feoffment with warranty to one, his heirs and assigns, and the feoffee doth reinfeoff one of the feoffors; in this case the warranty is not gone. And if in the first case the feoffee make an estate to his uncle in tail, or for \* life, saving the reversion; or a lease for life, the remainder over, &c. in this case, the warranty is only suspended.

\* P. 202.

Co super  
Lit. 391.

If one make a feoffment or release with warranty, and after is attainted of treason or felony; hereby the warranty is gone; and albeit he do afterwards obtain his pardon, yet the warranty is not revived.

Co. 6. 12.

If a feoffment with warranty be made to two, or more, and they being jointenants do after by deed make partition; by this the warranty is determined (1). So if two jointenants be, and one of them disseise the other, and he that is disseised doth recover in an assise and hath judgement to hold in severalty; hereby the warranty is determined. So if *A.* and *B.* be jointenants of white acre for life, and *A.* by fine doth grant to *B.* *totum & quicquid habet in tenementis*; hereby the warranty is gone. But if a partition be made by judgement upon a writ by force of the statute

Adjudged  
Hil. 22 Jac.  
B. R. Eu-  
stace &  
Shole's case.

*this fine is void  
for uncertainty  
2 J. Shole's case  
Shole's case*

(1) S. P. in *Hob. Rep. 25. Roll v. Osborn*, and S. C. cited *per cur.* in the cases of *Hawkins v. Cardy* in 1 *Ld. Raym. 360.* and 1 *Salk. 65.*

of 13 H. 8. this doth not defeat the warranty fallen to them; but it shall be divided between them, and they shall all of them take advantage of it.

If one infeoff three with warranty to them and their heirs, and one of them release to one of the other two; hereby the warranty is gone for that part. But if one of them release to the other two; in this case the warranty is not gone, but doth continue, and they may vouch upon it.

If one infeoff two men and their heirs with warranty, and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithstanding.

**Release.** If the party that hath the warranty, or the estate to which the warranty is annexed, release, to him that is bound to warrant, all warranties, or all covenants real, or all demands; by either of these releases the warranty is gone. So also if by a defeasance, made between the parties, it be agreed the warranty shall be void; by this defeasance the warranty may be avoided also. Or if it be so agreed that the warrantee or his heirs, &c. shall not vouch, or have a *warrantia charta*; by this the warranty is avoided in part.

If tenant in tail doth infeoff his uncle, who doth infeoff another in fee with warranty; if in this case the feoffee release the warranty to his uncle, hereby the warranty is extinct. But if a gift in tail be made with warranty, in this case, a release made by the tenant in tail of this warranty, will not extinguish it.

If the parties, between whom the warranty is, intermarry; hereby the warranty is suspended during the coverture in some cases.

If tenant in tail doth make a feoffment in fee with warranty, and disseiseth the discontinuee, and dieth seised, this doth suspend the warranty.

\* P. 203. If two make a feoffment in fee, and warrant the land to the feoffee and his heirs, and the feoffee doth release the warranty to one of the feoffors; this doth not determine the warranty of the other as to the moiety. So if one doth infeoff two with warranty, and the one of them doth release the warranty; this doth not extinguish the warranty for the other moiety, but it doth continue still.

A warranty also may lose its force by taking benefit or making use thereof; for after a man hath once taken advantage thereof, in some cases he can make no further use of it: of which read *Co. super Lit. 393 (1)*.

And now having done with deeds in general, and some of the parts thereof in special, we are in order to come to some special kinds of deeds; wherein we will first begin with a deed of Feoffment.

(1) See further in what cases a warranty shall be suspended, determined, defeated, or avoided, in *Bat. Abr. Warranty (O.)*, *Cam. Dig. Warranty (I. 3.)*, *2 Roll. Abr. 740.* *Fin. Abr. Voucher (C. 6.)*

New term  
of the law  
Co. super  
Lit. 9.  
Lit. Sect.  
57.

See West  
Sym. 1. par  
Sect. 235.  
Co. super  
Lit. 6.

Co. super  
Lit. 49. 9.  
Co. 1. 111  
112.  
Plow. 554.  
9 H. 7. 24.  
39 H. 6. 4.  
Co. super  
Lit. 237.  
Perk. Sect.  
210.  
24 E. 3. 7.  
Co. 1. 121.  
Co. 6. 70.  
Brp. scire  
facias 88.  
Plow. 423  
424.

(1) Feoff  
the law ca  
Lit. 9. a-  
notation of  
of a free i  
granted, t  
(2) For  
(3) To  
possession,  
Arg. in 1



## C. H. A. P. IX.

## Of a Feoffment.

New terms  
of the law  
Co. super  
Lit. 9.  
Lit. Sect.  
57.

**Feoffmentum**, i. e. *Donatio feodi*, strictly and properly is the gift or grant of any honors, castles, manors, messuages, lands, houses, or other corporeal immovable things of like nature, which be hereditary to another in fee simple, i. e. to him and his heirs for ever, by the delivery of seisin and possession of the thing given. And from hence comes the word *infeoff*; for by this word and the words *give* and *grant*, (as the most apt words for that purpose) is this kind of conveyance most commonly made (1). Hence also it is, that he that makes this feoffment is called the feoffor; and he to whom it is made, the feoffee. Also it is sometimes, but improperly, called a feoffment when an estate of freehold only doth pass.

See West  
Sym. 1. part.  
Sect. 235.  
Co. super  
Lit. 6.

This kind of conveyance albeit it may be made in most cases by word without any writing, yet is most commonly done by writing; and this writing is then called a deed or charter of feoffment: but hence is the division of a feoffment by word, or a feoffment by writing. The ancient forms and examples of these deeds are very brief; and yet they had these parts contained in them. 1. The premisses. 2. The *Habendum*. 3. The *Tenendum*. 4. The *Reddendum*. 5. The clause of warranty. 6. The *in cuius rei testimonium*. 7. The date. 8. The clause of *His testibus*. *Hæc fuit candida illius ætatis fides & simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt* (2).

Co. super  
Lit. 49. 9.  
Co. 1. 111.  
112.  
Plow. 554.  
9 H. 7. 24.  
39 H. 6. 43.  
Co. super  
Lit. 237.  
Perk. Sect.  
210.  
24 E. 3. 70.  
Co. 1. 121.  
Co. 6. 70.  
Bro. iure  
facias 88.  
Plow. 423.  
424.

And this manner of conveyance, as it is the most ancient kind of conveyance, so is it the best and most excellent of all others, and in some respects doth excel the conveyance by fine or recovery: for it is of that nature and efficacy, by reason also of the livery of \* seisin evermore inseparably incident to it, that it cleareth all disseins, abatements, intrusions, and other wrongful and defensible titles, and reduceth the estate clearly to the feoffee, when the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and sale by deed indented and inrolled will do, when the feoffor is out of possession (3). And it passeth the present estate of the feoffor, and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed: inasmuch that if one have divers estates, all of them pass by his feoffment; and if he have any interest, rent, common, or the like into or out of the land, it is extinguished and

3. The nature and operation of it.

\* P. 204.

(1) *Feoffment* is derived of the word of art *feodum*, quia *est donatio feodi*, for the ancient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment.—Co. Lit. 9. a.—A feoffment originally signified the grant of a feud or fee: that was the original and proper notation of the word: nevertheless by custom it came afterwards to signify a grant (with livery of seisin) of a free inheritance, to a man and his heirs; respect being had rather to the perpetuity of the estate granted, than to the feodal tenure. *Mad. Form. Angl. Dissert.* p. 4.

(2) For various precedents of feoffments, see *Mad. Form. Angl.* 174 to 216.

(3) To make a feoffment good and valid, nothing is wanting but possession, and where the feoffor has possession, tho' it be ever so bare and naked, yet a freehold or fee-simple passes by it by reason of the livery. Arg. in 1 Burr. 92. referring to Poph. 39. Lit. §. 595. 599. 611. 618. Co. Lit. 366. b. 377. a.

gone by the feoffment. And farther, it barreth the feoffor of all collateral benefits touching the land, as condition, power of revocation, writs of error, attaint, and the like; insomuch that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this he is barred for ever of taking advantage of the condition, or power of revocation. It destroyeth contingent uses, gives away a future use inclusively, gives away a seigniorie inclusively, and gives away a right of action: for both the feoffment, and livery of seisin incident thereunto, are much favoured in law, and shall be construed most strongly against the feoffor and in advantage of the feoffee. And besides all this, because it is so solemnly and publickly made, it is of all other conveyances most observed, and therefore best remembered and proved (1).

4. Who may make or take a feoffment: and what shall be said a good feoffment: or not: and what things are requisite thereunto.

1. In respect of the persons thereunto and the quality of their estate.

Aliens.

Idiots.

Feme covert.

Infant.

Attaint persons.

\* P. 205.

Outlawed persons.

Feme covert.

Corporation.

If the feoffment be made by deed then must the deed be so made, written, read, sealed, and delivered, as all other deeds that are well made must be. For which see *deed supra*, cap. 4. numb. 5.

And in every good feoffment that is made there must be a feoffor, *i. e.* a person able to grant the thing passed by the feoffment; a feoffee, *i. e.* a person capable of it and able to take it, and a thing grantable, and it must be granted in that manner as law requireth.

And for this therefore observe, that whosoever is disabled by the common law to take, is disabled also to make, a feoffment, gift, grant, or lease; and many also that have capacity to take by such conveyances have no ability to grant them; as men attainted of

treason, felony, or in a premunire, aliens born, the King's villains, ideots, madmen, a man deaf, blind, and dumb, from his nativity, a feme covert, an infant, and a man by duress; for the feoffments, gifts, &c. of such persons may be avoided (2). But such persons as have committed treason or felony, if attainder do not follow, such as are attaint of heresy, a leper removed by the King's writ from the society of men, bastards, such as are deaf, dumb, or blind, that have understanding and sound memory, albeit they cannot express their intentions otherwise than by signs, those that are drunken, the villains of a common person, before entry, &c.

also \* excommunicate persons, and outlawed persons, albeit the King take the profits of their lands; all these may make feoffments, gifts, &c. and all these have capacity to take by such conveyances.

A woman that hath a husband, alone and by herself without her husband, cannot make a feoffment of her own land, and if she do so, it is void, albeit her husband agree to it.

Neither the head alone, nor any one, or more, of the members of a corporation aggregate of many, alone, may make a feoffment of any of the land belonging to their corporation. But all of them together may make a feoffment: and if any of them be seised of land in his own right, and in his natural capacity, he may make a feoffment of this land as another man may do; yea he may make a feoffment of this land to the same corporation whereof he is a head or member, and so give and take also in a divers capacity.

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(1) See accordingly 2 *Bl. Com.* 310. and further as to the origin nature and operation of a feoffment *Stet. Ghss.* 510. *Wrights Ten.* 22. 38.—2 *Inst.* 110. 119.—*Dalrymple on Feuds* 202.—The conveyance by feoffment is now very little in use: see the note at the end of this chapter.

(2) See before in page 54. and the references in note 2 thereunto.

Co. super  
Lit. 43.

Ecclesiastical persons cannot make feoffments, gifts, &c. of their ecclesiastical lands for longer time than three lives, or twenty-one years; for all feoffments, gifts, grants, and leases by Bishops albeit they be confirmed by Dean and Chapter, or by any of the colleges or halls in either of the universities or elsewhere, or by Deans and Chapters, masters or guardians of any hospitals, Parsons, Vicars, or any other having spiritual or ecclesiastical living, are avoidable (1).

Perk. Sect.  
194.

A man cannot make a feoffment to his own wife after the marriage is consummate. But after a contract made, and carnal knowledge had, he may make a feoffment to her, and such a feoffment will be good (2).

Perk. Sect.  
197.  
Fitz. fails &  
feoffments  
26.

One jointenant cannot make a feoffment of his part of the land to his companion, for a man cannot give a possession to him that hath it before. And hence it is also that the lessor cannot make a feoffment to his lessee for life, years, or at will. And yet perhaps a feoffment in this case if it be in writing may work as a confirmation. But one tenant in common, or one coparcener may make a feoffment of his part of the land to his companion (3).

Bro. feoff-  
ment 4.Perk. Sect.  
222.

If a man make a feoffment of another's land, it is a disseisin, but a good feoffment against all men but the disseisee himself. And if four join in a feoffment of land, and three of them have nothing in the land, and the fourth hath all the estate, this is a good feoffment.

Perk. Sect.  
197.  
Co. super  
Lit. 48, 49.

A disseisor cannot make a feoffment of the land to the disseisee, but it will be void, for the disseisee will be remitted. But a disseisee may make a deed of feoffment and a letter of attorney to enter and give livery; and if the attorney do so, this will be a good feoffment.

Fitz. fails &  
feoffments  
21.Co. super  
Lit. 49.

at H. 7. 7.

See infra

Numb. 9.

Grant 5.

No feoffment, or livery of seisin can be made to the King, for he doth always give and take by matter of record (4).

A feoffment may be made at this day of anything which doth lie in livery, by whatsoever tenure it be held, notwithstanding the statute of *Magna charta cap. 32*. But in some cases where a man doth alien his land held of the King, he must have the King's licence before hand to do it, or else he must pay a fine to the King afterwards for not having a licence. But of such things whereof no livery of seisin can be made, no feoffment can be made.

Co. super  
Lit. 190.

One may make a feoffment of a moiety, third, fourth, or fifth part of his manor or other land, and that by the name of a moiety, third, or fourth part (5).

(1) If they exceed three lives or twenty-one years, under the statute of 13 *Elix. c. 10*. See further post, in the chapter on Leases.

(2) Though a husband cannot convey to his wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use. And according to some books, by custom of a particular place, as of *Tork*, the wife may take by immediate conveyance from her husband. See note 1 to *Co. Lit.* 3. a. 13th. edition, and *Co. Lit.* 112. a.

(3) The proper conveyance by one joint tenant to another, and what will most effectually sever the joint tenancy, is a release; for one joint-tenant cannot *infeoff* his companion, because they are both already seised *per mie & per tout*; and this manner of conveyance passing by livery, cannot operate so as to give him what he already has; but tenants in common have several distinct freeholds and may *infeoff* each other, but cannot release to each other, for a release supposeth the party to have the thing in demand. *Co. Lit.* 193. 200. b.

(4) See more amply who may make a feoffment, and to whom, in 4 *Co.* 125. 8 *Co.* 42. b. *Bac. Abr.* Feoffment (D.) 1 *Wood* 499. *Vin. Abr.* Feoffment (E).

(5) Feoffment by tenant in common is good of his moiety tho' undivided, *Br. Abr.* Feoffment pl. 75.



A feoffment may be made of an upper chamber over another man's house beneath.

If there be a meadow of one hundred acres, which time out of mind hath been divided amongst divers persons, and each person hath a certain number of acres, but in no certain place, the custom being to allot each person his number one year in one place, and another in another *alternis vicibus*; in this case, either of these persons may make a feoffment of his part, by the name of so many acres lying in such a meadow, without any bounding or describing of it.

If parceners have made partition of their land, that the one shall have it from Easter to Lammas to her and her heirs, and the other shall have it from Lammas to Easter to her and her heirs, or that the one shall have it one year, and the other the other year *alternis vicibus*: or if they have two manors descended, and they agree that the one shall have the one manor one year, and the other the other manor the same year, and the next year that he that had the one shall have the other *alternis vicibus* for ever: in these cases the parceners may either of them make a feoffment of this land or manor. (1).

3. In respect of the presence or possession of other persons on the land at the time of the feoffment made.

If there be any lease for life or years in being of that land or thing whereof the feoffment is made; and he that hath this lease for life or years, or in his absence his bailiff or servant keeping in the house or land whereof the feoffment is to be made, doth give leave and agree that livery of seisin shall be given upon the house or land by the lessor himself or by his attorney, and for this cause doth leave the possession of the house or land, and thereupon livery of seisin is made; this is a good feoffment and a good livery of seisin and yet it doth not prejudice the estate of the lessee. And if the lessor make a feoffment of the land to a stranger by assent or licence of the lessee the lessee then being on the land; this is a good feoffment. In like manner as it is, where the lessor doth entfeoff a stranger to which the termor doth agree saving his term. And if the lessor make such an entry upon the lessee for life, or years, as to put him out of possession of the house or land; and then he doth make a feoffment and livery of seisin of it; or if the lessor in the absence of the lessee, his wife, servants and children enter upon the thing in lease and make a feoffment and livery of seisin thereof; in these cases there is as good feoffment to pass the reversion, for in these cases, when the lessee for life or years doth re-enter, the law doth adjudge this to be an attornment in law. But if a lessor will enter upon his lessee, and against his will (the lessee being still in possession of the land) make a feoffment of the land, and give livery; this is void, and can never take effect as a feoffment. And therefore if there be a conveyance made of a house and land thereunto belonging in lease, and the feoffor comes into part of the land without the leave of the lessee, and there make livery of seisin of that part in the name of all the rest of the land, (the lessee himself, his wife, child, or servant being then upon any other part of the land, and especially if they be in the house) this is no good feoffment for any part of the land, but void for the whole. And yet if the lessee for years make

\* P. 207.

Attornment.

(1) See further of what things a feoffment may be made, *Co. Dig. Feoffment (A. 2.)* *Vis. Br. Feoffment (C).*

Chap. 4  
Veynor's case Trin. Jac. B. R.

Co. super  
Lit. 48.

21 H. 7. 7.  
Dier 18.

Perk. Sect.  
221.  
Dier 362.

Perk. Sect.  
223.

Perk. Sect.  
220.

Perk. Sect.  
219.

Perk. Sect.  
219. Bro.  
Feoffment.  
3. 17.

21 H. 7. 7.  
H. 6. 5.  
H. 7. 5.  
Stamf. prer. F.  
Regis 40.

(1) Lord Cattle upon the be upon the 31h. edition.  
(2) Ante p.

Veynor's  
case Trin.  
Jac. B. R.

Co. Super  
Lit. 48.

21 H. 7. 7.  
Dier 18.

Perk. Sect.  
112.  
Dier 362.

Perk. Sect.  
113.

Perk. Sect.  
110.

Perk. Sect.  
119.

Perk. Sect.  
119. Bro.  
Feoffment.

17.

21 H. 7. 7.

H. 6. 5.

H. 7. 5.

Stamf. prer.

Regis 40.

an under-lease of part of the land to another, and the feoffor doth make a feoffment of this part, and give livery of seisin upon this part; in this case the possession of the first lessee in the residue will not hurt the feoffment, or livery for this part; but it is a good feoffment. Also if the lessee give the lessor leave to make livery, and depart and leave a servant of the lessee upon the land; in this case it seems his presence upon the land whilst the livery is made will not hurt. And so if the lessee leave the possession and leave nothing upon the land but his cattle; they will not keep his possession, nor prejudice the livery of seisin (1).

If a lease be made of one acre to one, and another acre to another, and the lessor make a feoffment of both these acres, and make livery in one of them in the name of both acres; this is no good feoffment for the other acre, for by this livery he is not put out of possession of that acre. So if one make a feoffment of two manors, the one in possession and the other in lease, and give livery of seisin of the manor in possession in the name of both the manors; this is no good feoffment for the other manor, neither will it pass by this feoffment. So if one make a lease for years of a house, and after make a feoffment in fee of the house and of a close adjoining, and give livery of seisin of the house, the termor's wife and children being then in the house, in this case this is no good livery neither to pass the house nor the close.

If lessee for life, or years, make a feoffment of the land, the lessor being then upon the land and not contradicting it; it seems this is a good feoffment, and that the presence of the lessor upon the land, especially if he do not contradict it, will not hinder the virtue of the feoffment as against the feoffor and all others; but the lessor may enter afterwards for the forfeiture notwithstanding if he please. Forfeiture.

If the husband alone make a feoffment of the land, he hath in the right of his wife, or that he hath jointly with his wife, his wife being then upon the land and disagreeing to it; in this case the feoffment is good against the feoffor, and all others, but the wife, who notwithstanding her presence and disagreement, may after his death avoid it. Husband and wife. \* P. 208.

If one jointenant make a feoffment of the whole land, his companion being then upon the land; by this there doth pass no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety (2). Jointenant.

If a man enter into my land by wrong, and make a feoffment of it to a stranger, being then upon the land; this feoffment is void, for in this case the law doth adjudge me to be always in, and never out of the possession.

If the King have any possession of the land by wardship or otherwise, the owner of the land can make no feoffment of it. Prerogative. And therefore if the King be entitled to land by wardship, or primer seisin, after office found after the death of an ancestor of one of his tenants; in this case it is said the feoffment of

(1) Lord Coke's words are "if the lessee be absent, and hath neither wife nor servants (though he hath cattle) upon the grounds" the livery of seisin shall be good. *Co. Lit.* 48. b. but if lessee consents, though he be upon the ground, livery is good. *Tr. 40th. Eliz. Sheppard and Gray.* See further in note 8. to 3th. edition. *Co. Lit.* 48. b.

(2) Ante p. 201. note 2.

the heir is void and passeth nothing, for the King is still in possession. And if it be before office found it will be all one, for the office shall relate to the death of the ancestor. And yet in these cases the feoffment is good against the heir himself, and all others besides the King. If the heir, before office found, enter and make a feoffment, and then the King doth pardon the feoffee; in this case the feoffment is good. And yet such a feoffment after office with a pardon is void. And the like law is if the entry be before office, and the pardon after the office; for this is void also. But if a man be outlawed for debt or trespass, and thereupon the King hath the profits of the lands; in this case the owner may make a feoffment of this land notwithstanding.

Outlawed persons.

4. In respect of the manner of making of it. Reversion.

Divers persons cannot make a feoffment but it must be by deed, as corporations, and such like: also divers things cannot be granted by a feoffment, but the feoffment must be by deed, for a feoffment cannot be made of a reversion of land but it must be by deed. But a lease may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only (1). Also a feoffment may be made of the moiety, third, or fourth part of a manor, or of a piece of land without deed. And yet if one be seised of a manor, whereunto an advowson is appendant, and he make a feoffment of three acres parcel of the manor, together with the advowson to two men, *Habendum* the one moiety with the advowson to one of them, and the other moiety to the other; in this case the feoffment cannot be well made unless it be by deed.

If a lease be made for five years, on condition that if the lessee pay to the lessor within the two first years ten pounds, then that he shall \* have the land to him and his heirs, or otherwise but for five years; in this case if livery of seisin be made to the lessee before his entry this is a good feoffment. *Et sic de similibus.*

Livery of seisin.

Every feoffment also whether it be made by deed or without deed must be made with livery of seisin, and this livery of seisin must be made according to the rules of livery and seisin herein after laid down, for this is of the essence of a feoffment, and a feoffment is not accounted perfect until livery of seisin be made, for until then, the feoffee hath only an estate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of seisin be made the feoffment is void, and no warrant of attorney to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this case to get the assurance to be made perfect but in a Court of Equi-

(1) But by the statute of 29 Car. 2. c. 3. § 3. It is enacted "That no leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law"—and by the same statute It is enacted "That all leases estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, &c. made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making and creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

New terms of the law.

West 2. part Symb. Sect. 251. Co. super Lit. 48.

Fitz. Falt. & Feoffments 31 See Grant Numb. 4.

Lit. Sect. 60. super Lit. 150.

Co. super Lit. 48.

Bro. estates 4 Plow. 28. 29.

(1) In the tie, by way made in 1655 equity, as he should prefer but that howe least Cases in fictive conveyance wants livery and assistance and will remedy essence of a conveyance and in what respect hold (P. 2.)

(2) Seisin is admitted into the 1 Barr. 107. 510. Mad. (3) The doctrine frequently regre (4) In what to the difference

East v. Howell Plowden

Equity.



ty (1). But in case where there are many feoffees, there the death of one or some of them will not hinder the livery, but it may be made to him or them that do survive: we must see therefore in the next place what this livery of seisin is.

New terms  
of the law.

Livery of seisin, or giving of possession, is a solemnity or overt ceremony, required by law, and used for the passing of lands or tenements corporeal, as an evidence or testimonial of the willing departing by him that makes the livery, from the thing whereof livery is made, and the willing acceptance thereof by the other

5. Livery of  
seisin. *Quid.*

West 2. part  
Symb. Sect.  
151.  
Co. super  
Lit. 48.

party (2). And this is as ancient as a feoffment; for no feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances. And it was first invented as an open and notorious act to this end; and that by this means the country might take notice how lands do pass from man to man, and who is owner thereof; that such as have title thereunto may know against whom to bring their actions; and that others may know that have cause, of whom to take leases, and of whom to require wardships, &c. And by this means, if the title come in question, the jury can the better tell in whom the right is (3).

Co. super  
Lit. 48.

And of this livery of seisin there are two kinds. 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed, is, when the feoffor, donor, &c. by himself, or another, taketh the ring of the door of the house, or a turf, or twig of the land, and delivereth the same upon the land unto the feoffee, donee, &c. in the name of seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their attornies or procurators. The livery in law, is, where the feoffor saith to the feoffee, being in view of the land, I give you yonder house to you and your heirs, go enter into the same, and take possession thereof accordingly, or the like (4).

6. *Quatuorplex.*

Bro. estates  
4 Plow. 28.  
29.

Because this manner of conveyance by feoffment is so ancient, \* therefore this ceremony (being inseparably incident to a feoffment) is much favoured in law: and therefore it is expounded and taken strongly against him that doth make it, and beneficially \* for him to whom it is made. And for this cause, it worketh not only to transmute the present estate, but also to bar all present

7. The nature and operation of it.

\* P. 210.

(1) In the case of *Jackson v. Jackson* heard in November 1730, a deed of lands in two different counties, by way of feoffment; livery and seisin of the lands in one county only, indorsed.—The deed was made in 1657. Ld. Chancellor King declared the plaintiff had a good foundation to apply to a court of equity, as he had not his evidences to try his title at law.—that were he to try the matter (at law) he should presume, and so direct, that livery was executed according to the deed, after that length of time; but that however a court of equity would aid a defect of that kind. *Fitz. Gibb. Rep.* 146 S. C. in several *Cases in Chancery* 81.—See also *Bokenham v. Bokenham*, 1 *Chan. Ca.* 240.—and where such a defective conveyance is aided, it shall be discharged of mesne incumbrances by the party; as, if a mortgage wants livery, and thereupon the heir confesses judgments to another, the mortgagee shall be released and discharged from the judgments. *Burgh v. Burgh, Rep. in Chan. Temp. Finch* 28.—The assistance and relief, afforded by a court of equity, in aid of a defective conveyance, is very extensive; it will remedy not only mistakes in form or upon the face of the deed, but will supply the material part or essence of a conveyance; as livery to a feoffment, a surrender of a copyhold; &c.—In what cases, and in what manner, equity will supply defective conveyances, see in *Com. Dig. Chancery* (2 T.) Copyhold (P. 2.) *Eq. Ca. Abr. Deeds* (D.) *Vin. Abr. Fairs* (T. a.)

(2) *Seisin* is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass, per Ld. Mansfield, 1 *Barr.* 107.—For the original intent and manner of transferring lands by livery of seisin, see *Spel. Gloss.* 510. *Mad. Form. Angl. Dissert.* 9.

(3) The disuse of livery of seisin, and the want of sufficient notoriety thereby occasioned, is very frequently regretted by Mr. J. Blackstone. See 2 vol. *Com.* 337. See also *Bac. Law Tracts.* 154.

(4) In what cases livery may be made within the view, see *Vin. Abr. Feoffment* (M.) and further as to the different kinds of livery, in *Bac. Abr. Feoffment* (A.) *Com. Dig. Feoffment* (B)

and

and future rights and possibilities. If therefore one make a lease for life to *I. S.* the remainder to the right heirs of *I. D.* (which *I. D.* is then living) and give livery of seisin according to the deed; in this case, albeit he in remainder be not capable of this remainder, yet by the livery it shall pass out of the feoffor, and shall be in abeyance during the life of *I. S.* So if a feoffment be made to one *E. & hereditibus*, without the word [*Suis*,] and livery of seisin be made of the deed; this livery perhaps may make the estate good (1).

S. Where and in what cases it is requisite: or not.

Livery of seisin is needful, and must be had and made, in all cases where any estate of fee simple, fee tail, or for a man's own or another man's life, is made or granted by writing, or word, in the country of any lands or tenements corporeal (2). And so also where one doth make a lease of land to another for years, the remainder to a stranger in fee simple, fee tail, or for life; in these cases, livery of seisin must be had and made to the lessee for years, or else nothing will pass to him in remainder; and yet the lease for years will be good. And so also where a lease for years is made, upon condition that if such a thing happen the lessee shall have the fee simple; in this case, the lessee must have livery of seisin before his entry, otherwise the estate will not increase. And so also if the King make a feoffment of the land he hath in the right of the Duchy of Lancaster that is not within the county Palatine; in this case, livery of seisin must be made as in the case of a subject. And in all these cases where livery of seisin is requisite, and it is not made, there doth pass no estate by the conveyance but an estate at will at the most.

But livery of seisin is not needful or requisite to be had and made, in cases where any estate of fee simple, fee tail, or for life, is made, or granted, of any lands, by matter of record, as, by the King's letters patents, fine, recovery, deed indented and inrolled, and the like: nor is it needful where any such estate is created by way of covenant and raising of use, by way of exchange, indowment *ad ostium ecclesie*, or *ex assensu patris*; nor is it needful where any such estate is passed or granted by way of surrender, devise, release, or confirmation, or by way of increase or executory grant; as when the fee simple is granted to the lessee for life or years in possession: neither is it requisite, or can be made, where any incorporeal hereditaments, as reversions, rents, commons, or the like, are granted in fee simple, fee tail, or for life: for in some of these cases there is an attornment to be made that doth supply a livery: neither is it requisite in some cases where an estate of freehold is made of a corporeal thing; as if a house or land belong to an office, and the office be granted by deed; in this case, the house or land doth pass as incident thereunto. So if a house or chamber belong to a corody; in this case, by the grant of the corody, the house or chamber passeth without any livery of seisin. Neither is it requisite upon a lease for years; for if a man make a lease for one thousand

(1) As to the operation of livery to pass a future interest, where the feoffor is out of possession; and in what cases several parcels will pass by one livery, or where several parties may take by a livery to one, see *Bar. Abr. Feoffment* (B.)

(2) For at common law no estate of freehold in lands could pass without livery of seisin: and therefore it is a rule that no freehold can be created to commence in *future*; for the livery of seisin must operate immediately, or not at all. 5 Co. 94.

Co. 5. 92.  
Lit. Sect. 70.  
Co. 5. 18.  
Doct. &  
Stud. 13.  
Co. super  
Lit. 49.

Co. super  
Lit. 216.

Plow. 214  
219.

Co. 2. 23.  
Lit. Sect.  
59.  
Co. super  
Lit. 49.

perhaps in  
two centuries  
have a due  
p. 14

Chap. 9.  
Co. 8. 127.  
11. 49.

Perk. Sect.  
184.  
Co. super  
Lit. 48. 49.  
52.

Co. super  
Lit. 48. 49.

Dier 35.  
Co. super  
Lit. 49. 359.  
Co. 5. 95.

Co. super  
Lit. 217.

Perk. 40.  
10 E. 4. 3.  
Co. super  
Lit. 52.

(1) See

years,

years, this lease is perfect by the delivery of the deed without any livery of seisin. Neither is it needful where one doth grant to me and my heirs all the trees growing on his ground, for these will pass without any livery of seisin at all (1).

Livery of seisin may and must be made either by the party himself that maketh the estate, or if it be a livery in deed, it may in his absence be made by his attorney sufficiently authorized by writing. And he that may make an estate, to the perfection whereof livery is requisite, may himself, and in his own right, make livery thereupon; and in right of another, and as attorney to another; so divers that cannot make any estate, may notwithstanding make livery of seisin. And therefore the husband albeit he may not make a feoffment in fee, or lease for life, &c. of land to his wife, yet he may as an attorney make livery of seisin to her upon a conveyance made by another. And so also may the wife upon a conveyance made to the husband or her. And so also monks, infants, aliens, and such like persons disabled to make feoffments &c. may notwithstanding make livery of seisin as attorney's upon conveyances made by others. And so likewise may he in remainder in fee make livery to the lessee for years. *Et sic de similibus.* And this livery of seisin may and must be made to the party himself that taketh the estate, or in his absence to his attorney or procurator sufficiently authorized: and in this case any one may be an attorney to take that may be an attorney to give livery. If a feoffment be made to divers by deed, and livery of seisin is made to one or some of them; this is a good livery to execute the estate to them all. But if a feoffment be made to divers without deed, and livery of seisin is made to one or some of them in the name of all the rest; in this case, the feoffment is good to execute the estate in him or them to whom the livery is made, and void as to the rest. If a lease for years be made to *A.* and *B.* without deed, the remainder to *D.* in fee, and livery of seisin is made to *A.* or *B.* in this case this is a good livery to make the remainder to pass to *D.* But if a lease be made for years to *A.* the remainder to the right heirs of *I. S.* in fee *I. S.* being then living, and livery of seisin is given to *A.* this remainder is void, for *nemo est heres viventis.* One jointenant cannot make livery of seisin to his companion as a tenant in common may. And a lessor cannot \* make livery of seisin to his lessee for life or years. See before *numb. 4.*

In all cases where this ceremony is requisite, whether it be done by the parties themselves in person, or their deputies, it must be done and made, 1. in the life time of the feoffor, donor, or lessor, and in the life time of the feoffee, donee, or lessee; for if either of them die, it cannot be done afterwards; neither can a warrant of attorney be made to deliver seisin after the death of the feoffor, &c. But if there be more feoffees, donees, or lessees, than one; in such cases, albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute the estate in all the land. And so it is if there be a warrant of attorney made by a corporation aggregate, as a Mayor and Community, Dean and Chap-

9. How it may be and must be made: and what shall be said a good livery of seisin: or not.

1. In respect of the persons that make it, and to whom it is made, and the quality of their estate. Woman co-vert infant.

See 208.

\* P. 212.  
2. In respect of the time when it is made.

(1) See more amply in what cases livery of seisin is requisite in *Vin. Abr. Feoffment (B.)*



ter, or the like, to give livery of seisin, in this case the death of the Mayor, &c. will not determine the authority; and therefore in that case the livery of seisin may be made after his death. 2. If it be a lease for years with a remainder over in fee, the livery must be made to the lessee for years before his entry or at the time when he doth enter for that purpose; for afterwards it cannot be made. *Quod semel meum est, amplius meum esse non potest. Quere* also whether the law be not so in all other cases; and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. And yet it seems the livery of seisin is good, when it is made afterwards, by Co. 2. 55. 3. It must not be made before the estate begin; for if a lease be made for years to begin at Michaelmas with a remainder over, and the livery of seisin is made before Michaelmas; this livery of seisin is void; for if a livery work at all, it must work presently; and so it cannot in this case, because it is before the estate doth begin.

A caveat.

3. In respect of the place or thing wherein it is made.

If an estate be made of divers pieces of land in divers villages in the same county; in this case, the making of livery of seisin of and in any part thereof, in the name of all the rest, or of one parcel according to the deed, albeit he doth not say in the name of, &c. sufficeth for all, if all the pieces be in the grantors possession and out of lease. But if the pieces of land lie in divers counties; or in the same county, and they be in lease, or out of the possession of the feoffor, *contra*; for in that case the making of livery in one part in the name of all the rest, is not sufficient for the rest; for in this case, it is requisite that livery of seisin be made upon and in some of the lands in both counties, and upon every parcel of land that is out of possession, or at least in some parcel of the land in the occupation of every several tenant. And yet if one part of a manor be in one county, and the other part in another county in view of that part; in this case it seems livery of seisin in the one part in the one county, in view of the other part in the other county, is good and sufficeth for all. \* So if the scite of a manor lie in one county, and the rest of the manor in another county; in this case, the making of livery in the scite of the manor is sufficient for the whole manor. If a feoffment be made of the manor of Dale in Sale, the which manor doth extend in Dale and Sale, and livery of seisin is made accordingly in Dale only and not in Sale also; by this feoffment there doth pass no more of the manor but that which is in Dale only (1). If I be seised of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of seisin in that acre whereof I am seised in fee in the name of both acres; in this case it seems this sufficeth to pass both the acres. But if I be seised of one acre in fee, and possessed of another acre for years, and I make a feoffment of both acres and livery of seisin in that acre only whereof I am seised in

(1) If a manor extends into two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin. *Hal. MSS.* But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. *Perk. Sect. 227.* However he admits that if one be disseised of two acres in different counties, entry into one acre in one of the counties though made in the name of both acres, will not extend to the acre in the other county. *Perk. Sect. 229. note 2, to Co. Lit. 50. a. 13th edition.* See further in *Vin. Abr. Feoffment* (D. a.) pl. 4.

Co. super  
Lit. 49. 116.  
Perk. Sect.  
205.

Co. super  
Lit. 217.

Co. super  
Lit. 48.  
Perk. Sect.  
227. 238.  
Doct. &  
Stud. 3.  
Lit. Sect.  
61. 418.  
Perk. Sect.  
226.  
Fitz. feoff-  
ments &  
Faits. 111.

9 H. 7. 45.  
per Frowick.

Fitz. Fait.  
Feoffmen  
2.

Montague  
versus  
Jefferies.

See infra.

See before  
Numb. 4.

Dier 362.

Bro. feoff-  
ments 24.

Co. super  
Lit. 49.

Co. o. 137.  
super Lit. 45.

West. Smyth  
1. part. Sect.  
231.  
Perk. Sect.  
209. 210.  
Co. super  
Lit. 48.

(1) And

see,

fee, in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am seised, and of other land whereof I am not seised; *&c.* If I be seised of two acres of land, and let one of them for years, and then make an estate of both of them to another, and make livery of seisin in that I have in possession, in the name of both the acres; this will not serve to pass the other acre, but livery must be made in that acre also. And accordingly it was agreed in a case in the King's Bench *Hil. 38 Eliz.* which was, that a man was seised in fee of a manor and other lands called groves, and he made a feoffment of it (groves being then in lease for years) and a letter of attorney to give livery, and the attorney made livery of the manor in the name of the rest, the lessee being still in possession of groves; in this case it was agreed that this was no good feoffment for groves.

When a feoffment is made of a house and land, the livery of seisin is most aptly to be made of and in the house in the name of the rest, and at the door of the house, *&c.* And when a feoffment is made of a rectory or parsonage; the livery of seisin may be made in the parsonage house; or, if there be no house, it may be made upon the glebe; or, if there be neither, it may be made at the ring of the church door.

In the making of every livery of seisin it is requisite that all persons that have any lawful estate and possession in the thing whereof livery is to be made, as lessees for life, years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate possession to the feoffee, donee, *&c.*

If lessee for years make a feoffment and a warrant of attorney to give livery of seisin, and the attorney make livery of seisin, the lessor being present upon the land, and not contradicting it; it seems this is a good livery of seisin.

The presence of the feoffor, donor, *&c.* upon the land after he hath delivered seisin to the feoffee, donee, *&c.* albeit he stay upon the land a while, and do not depart and leave the feoffee, *&c.* in possession, will not hurt the livery. See more *supra* numb. 4.

Livery of seisin may be made of any corporeal thing, as manors, houses, lands, meadows, pastures, woods, chambers, or the like. And these things therefore are said to lie in livery. But of incorporeal things, as rents, advowsons, commons, estovers, and such like things livery cannot be made. And these things therefore are said to lie in grant and not in livery. And therefore when a livery is made of these *nil operatur*. See more above numb. 4. (1).

To every good livery of seisin is requisite either such an act as the law doth adjudge to be a livery, or apt words that do amount unto it, for a livery may be good by words without any act or deed at all; but it cannot be good by an act or deed without any words at all; howbeit that livery that hath an act or ceremony in it is the best, because it taketh the deepest impression in the witnesses.

The most usual formal and orderly manner of making of livery of seisin is thus; that the feoffor, donor, *&c.* and the

(1) And further in *Vin. Abr. Feoffment (C.) Com. Dig. Feoffment. (A. 2.)*

feoffee, donee, &c. if they be present; or, in their absence their attornies or servants that have authority; do come to the door, backside, or garden if it be a house, if not, then to some part of the land where seisin is to be delivered, and there in the presence of many good witnesses do shew the cause of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney if there be any. And then the feoffor, &c. or his attorney (if it be a house) do take the ring, latch, or hasp of the door (all the people, men, women and children being out of the house,) or (if it be of a piece of ground) do take a clod of the ground, or a bough or twig of a tree, or bush, growing thereupon; and (all the people being out of the ground) the same ring, &c. clod, bough, &c. with the deed do deliver to the feoffee, donee, &c. or to his attorney; and in the delivery thereof do use these or some such like words, *viz.* I deliver these to you in the name of seisin of all the lands and tenements contained in this deed, to have and to hold according to the form and effect of the same deed. Or, I deliver you seisin and possession of this house, or ground, in the name of all the lands contained in the deed, according to the form and effect of the deed (1). And then if it be a house, the feoffee, &c. doth enter in first alone, and shut the door, and then he doth open it, and let in others. And if the feoffment, gift, or lease be made without deed, then they do and must withal express the very estate itself which the feoffee, donee, or lessee is to have: as for example, the feoffor, donor, or lessor must come to the house, or land, which is to be granted, and where livery of seisin is to be made, and there must by apt words grant the house or land to him that is to have it, in fee simple, or in tail, or for life, (as the agreement is) and in seisin thereof must \* deliver him the ring of the door, or a turf or twig of the land. And if the feoffment, &c. be made by writing, then it is wisdom to indorse and set down on the back of the same, how, when, and where the same is made, and the names of the witnesses thereunto. But a livery of seisin that is not so exactly made may be good notwithstanding. And therefore if the feoffor, donor, &c. or his attorney, take any thing else that comes from off the land, as a stone, or the like, and therewithal doth make the livery of seisin; or if he take a turf, or twig from off another man's ground, and not from the same whereof possession is to be given, and deliver that upon the ground in the name of seisin; or if he take a piece of silver or gold, or a rod, stick, or the like, and deliver this upon the land in the name of seisin; all these are good deliveries of seisin and possession. So if the feoffor, &c. be at the door of the house, or by the land, or in the house, or upon the land, and after he hath delivered the deed he say to the feoffee, donee, &c. [Here I deliver you seisin and possession of this house, or land, in the name of seisin and possession of all the lands and tenements contained in the deed;] Or, [have and enjoy this house or land according to the deed;] Or, [enter into this land or house and God give you joy of it;] Or,

\* P. 215.

(1) In the times of our Saxon ancestors the delivery of a turf was a necessary solemnity to establish a conveyance of lands. *Hicke's Dissert. Epistolar.* 85. 2 *Bl. Com.* 313.



[I am content you shall enjoy this land ;] in all these cases there is a good livery of seisin. *Et sic de similibus.*

Bro. Feoff-  
ment 28.

If I being seised of a house in fee, make a feoffment of it and of divers lands, to a man then present with me in the same house, and there deliver him the deed in the name of seisin of all the lands contained in the deed ; in this case, this is a good delivery of the deed, and a good livery of seisin also, albeit I continue in possession of the house still and go not out of it. And if I be Lord of a manor, and lying sick within some part of the manor, I make a feoffment of the manor, and deliver the deed to the feoffee, saying to him, I will that you take seisin presently ; and thereupon command all my tenants of the manor to attorn to him, and they do so ; this is a good livery of seisin. So if I

Perk. Sect.  
211, 112.

Perk. Sect.  
215.  
Co. 6. 26.

make a deed, and after I have read it, being upon the land, I deliver it to the feoffee, donee, &c. and say, here I deliver you this charter as my deed in the name of seisin of all the lands therein contained, or the like ; this is a good delivery of the deed and of seisin. But if I do only seal and deliver the deed upon or in view of the land, without saying or doing any more ; this will not amount to a livery of seisin. And therefore if a man make a feoffment with a letter of attorney to give livery of seisin, and then he deliver the deed upon the land ; this is no good making of livery of seisin. And so also if there be no letter of attorney.

Cromwal's  
case. Ad-  
judged in  
the Exche-  
quer 15 El.

Co. 6. 26.

If I be seised of a house in fee, and being in the house say to I. S. here I. S. I demise you this house for term of my life ; this \* will not amount to a livery of seisin ; and therefore it is no good lease until livery of seisin be made, but it is a good beginning of a lease.

\* P. 216.

Perk. Sect.  
216.

If the father infeoff his son of land, and the son suffer his father to enjoy it, and after the son doth come to the parish church where the land doth lie, and there, in the audience of the parishioners, useth these words to his father, [father you have given me such and such lands (and doth name them) as freely as you gave them to me I give them to you again ;] this is no good livery of seisin, neither doth any estate pass hereby. So if one being upon his land say to I. S. [I. S. stand forth, I do here, reserving an estate to me for mine own life, give this land to thee and thy heirs for ever ;] this is no good livery of seisin, neither doth any estate pass hereby. So if one make a charter of feoffment to me, and make no livery of seisin thereupon, and after I make a feoffment of the land to I. S. and the feoffor hearing and having notice of it, saith, [I do willingly agree to it, and am contented that I. S. shall have it ;] or I do agree to the feoffment, or the like ; in this case this doth not make the feoffment that was made to me good.

Hil. 37 El.  
B. R. Cal-  
land's case.

Fitz. saits &  
feoffments.

Co Super  
Lit. 48.  
Fitz. Eitop-  
pel 177.

If divers parcels of land be conveyed, and livery of seisin is made in one ; or there be divers feoffees, and livery of seisin is made to one of them according to the deed, without using any more words ; this is good. But the best form and order of making of livery in this case is to add these words, [in the name of all the rest, &c.] (1).

(1) See more amply as to livery of seisin in deed, by whom, at what time, and in what manner it may be made, in *Buc. Abr. Feoffment (A.) Vin. Abr. Feoffment (E.) (F.) Com. Dig. Feoffment (B.)*

Livery in  
law, or with-  
in the view.

If the feoffor, donor, &c. deliver the deed in sight or view of the land, and use these or any such like words, [I will that you shall enter into the land and have it according to the deed;] or, [take and enjoy the land according to the deed;] or, [I deliver you this deed in the name of feisin;] or, [enter you into the land and take feisin of it;] or, [take the land and God give you joy of it;] or, (if the estate be made without deed) [I give you yonder land to you and your heirs, and go and enter into the same, and take possession thereof accordingly;] or, [enter into the land and enjoy it in fee simple to you and your heirs, or for your life, &c.] in all these cases the estate and the livery is good, albeit the feoffor, &c. stand in one county, and the land in view be in another county. But in all these cases of livery within the view.

1. It must be made by the person himself that doth make the estate, for it cannot be made by his attorney. 2. There must be a relation to the land, for if the feoffor do deliver the deed only to the feoffee in sight of the land; this is not a good livery within the view. 3. The parties must stand within view of the land, for if the feoffor, &c. being out of the sight of the land say to the feoffee, &c. Go and enter, and take feisin of the land, and God send you joy of it; this is no good livery of feisin. 4. There must be some body capable of a freehold to take by the livery, for if it be made to a lessee for years, the remainder to the right heirs of I. S. and I. S. is then living, it is void. 5. The feoffee, &c. must enter presently, for if either the feoffor, donor, &c. or feoffee, donee, &c. die before entry; the livery cannot be made good (1). And yet if the party dare not enter for fear, in this case if he claim it only, and do not enter it is sufficient (2).

10. Where livery of feisin made or taken by an attorney shall be good: and where not: and what warrant is sufficient.

Livery of feisin in deed may be made or taken by the deputies or attorneys of the parties, and this livery by them is as good as that livery of feisin which is made by the parties themselves; and that also as it seems albeit the parties themselves be upon the land at the time of the making thereof if they do not contradict it (3). But in the making of this livery care must be had. 1. That there be a deed of feoffment, for otherwise a letter of attorney to deliver possession availeth nothing. 2. That there be a good authority in writing, which may be either in the deed of feoffment itself, whether it be poll, or indented, and that albeit the attorney be not party to it, or else by a single deed besides the feoffment, &c. 3. That the attorney do pursue his authority at least in the substance and effect of it. 4. That the attorney do it in the name of the feoffor, law.

Co. 9. 137.  
6. 26. super  
Lit. 48. 233.

1] New  
terms of the  
law.  
Co. super  
Lit. 48.  
Dier 18.  
2] 18 H. 6.  
16.  
3] Co. super  
Lit. 47.

5] Co. 1. 156.  
Perk. Sect.  
214.  
Fitz. fails &  
feoffments.  
49.

Co. super  
Lit. 52.  
Celw. 51.  
Co. 9. 76.  
Terms of  
the law, tit.  
Livery.

The opinion  
therefore in  
Co. super  
Lit. 52. 6.  
as to this  
point is held  
not to be  
law.

(1) The feoffee ought to execute it and take possession presently, or the livery will not avail him; because a frank-tenement cannot be in abeyance. *Mo. 85.* It is laid it will be good if the feoffee enters in the life of the feoffor, altho' the feoffee be a woman, and married before her entry, to the feoffor, or any other who enters and claims in right of his wife. *Parsens v. Perns, 1 Mod. 91.*

(2) For it will be a good execution of the livery and vest the frank-tenement in him. *Co. Lit. 48. b.* see further as to the perfection of livery within view, in *Bac. Abr. Feoffment (A. 2.) Vin. Abr. Feoffment (1.) and Com. Dig. Feoffment (B. 4.)*—by what act livery within the view may be countermanded, see *Vin. Abr. Feoffment (P. 2.)*

(3) A man may either give or receive livery by his attorney; for since a contract is no more than the content of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties to the contract.—But such delegation or authority, to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued. *Bac. Abr. Feoffment (E.)*

donor.

Bro. Fe  
ments.  
Aff. pl.  
Perk. S.  
23.

Dier 28.

Co. super  
Lit. 52.

Co. super  
Lit. 52. 2.  
Perk. Sect.  
187, 188  
189.

(1) An  
livery, an  
toney to  
Max. 161.

donor, &c. who doth give the authority. 5. That it be done in the life-time of the parties. But a livery in law may not be made by an attorney. And therefore if a letter of attorney be to deliver seisin generally, and the attorney by virtue thereof deliver seisin in view; this livery of seisin is void (1).

Bro. Feoff-  
ments. 25.  
Ass. pl. 4.  
Perk. Sect.  
23.

If an infant, or woman covert, make a feoffment and letter of attorney to make livery, and the attorney do so; this is void, for they are not able to give such an authority. And if a man whilst

Infant.  
Woman  
covert.

he is of sound memory, make a feoffment with a letter of attorney to give livery, and after he become paralytick and so dumb, but by signs he doth declare himself to be willing to have livery of seisin made, and it is made; this is a good livery of seisin. But if a letter of attorney be made to deliver seisin of certain land by one that is *non sanæ memoriæ*, and the deed of feoffment was made whilst he was of sound memory, and afterwards he doth come to his memory again, and then the livery is made upon the first warrant without any new assent, &c. in this case the livery is not good.

*Non sanæ  
memoriæ.*

Dier 283.

That for the most part, which for the manner and order of making it is a good livery of seisin if it be made and taken by the parties themselves, is good being made and taken by their attorneys or deputies that have a good authority and do well pursue it. And therefore if the conveyance be made of divers lands, and they lie in one county, and a warrant of attorney is made to give livery generally, and the attorney doth make it in one part of the land in the name of all the rest; this is a good livery. *Et sic de similibus.*

Co. super  
lit. 52.

\* If a man be seised of black acre, and white acre, and he make a deed of feoffment of both these acres, and a letter of attorney to enter into both these acres, and to deliver seisin of both of them according to the form and effect of the deed, and he doth enter into black acre and deliver seisin *secundum formam chartæ*; in this case, the livery of seisin is good, albeit he doth not enter into both the acres, nor into one acre in the name of both. And if the feoffment be made to two or more, and the warrant of attorney is to make livery to them both, and the attorney doth make livery of seisin to one of the feoffees *secundum formam & effectum chartæ*; in this case the livery is good to both, and yet he that is absent may waive the livery.

\* P. 218.

Co. super  
lit. 52. 258.  
Perk. Sect.  
187, 188,  
189.

And yet if a man be disseised of black acre and white acre, and a warrant of attorney is made to one to enter into both these acres, and to make livery, and the attorney doth enter into one acre only, and make livery of seisin there *secundum formam chartæ*; in this case the livery of seisin is void for all, for in this case he doth less than his authority. So if a man make a letter of attorney to deliver seisin to *I. S.* upon condition, and the attorney doth deliver seisin absolutely; this livery of seisin is void. And so in all such like cases where the attorney doth less than the authority and commandment, all that he doth is void. But for the most part where the attorney doth that which he is authorised to do, and more also, it is good for so much as is warranted, and void for the rest. And

(1) An attorney cannot make livery in view, because his warrant is intended of an actual and express livery, and not of a livery in law. *Co. Lit. 52. 2 Roll. Abr. 9.* An attorney cannot make a letter of attorney to another to give livery. *18 E. 4. 12. b. 19 H. 8. 10. 2 Roll. Abr. 9.* See further in *Noy's Max. 161.*

therefore



therefore if the letter of attorney be to give livery of seisin to *I. S.* Perk. Sect. and the attorney give it to *I. S.* and *W. S.* this livery is good to *I. S.* and void to *W. S.* So if the letter of attorney be to give livery of seisin of white acre only, and he make livery of white acre and black acre also; this livery is good for white acre, and void for black acre. So if the letter of attorney be absolute, and the attorney give livery upon condition; some hold this to be good, and the condition to be void.

If a letter of attorney be made to two jointly, to make or take livery of seisin, and one of them alone doth it without the other; this is a void livery. But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it (1).

If a letter of attorney be to make livery of seisin after the death of another man, and the attorney doth make livery of seisin during that man's life; this livery is void (2).

\* 1. How it shall enure, and be taken and construed.

\* P. 219.

Livery of seisin is sometimes made single, and without any relation to the deed, whereby the estate upon which the livery is made, is created, at all: and sometimes, and most commonly, it is made with reference to the deed in these, or such like words, [*secundum formam chartæ*]. In the first case the estate is often times made upon the livery; and then there may be one estate contained in the deed, and another made by the livery; also there may pass more land by the livery than is in the deed, and by this means when there is a fault in the deed, so that the land will not pass by the deed, it may perhaps pass by the livery: but in this case then there must be apt words used in the making of the livery to create the estate also, as well as to give the possession. But where the livery of seisin is made with relation to the deed, there it must take effect according to the deed or not at all; for these words *secundum formam chartæ*, are to be understood according to the quantity and quality of the effectual estate contained in the deed. And therefore if one make a deed of feoffment to another, and in the deed there is contained no condition at all, and when the feoffor doth make livery he doth make livery upon condition; or if the deed contain an estate to him and his heirs, and he maketh livery of an estate in tail or for life; in these cases there doth pass nothing by the deed. And yet if there be apt words used to create such an estate at the time of the livery made; such an estate may be made by the livery without the deed, and then the deed shall be void. But if in these cases the feoffor say, when he doth make livery on condition in tail, or for life, *secundum formam chartæ*; in this case there is a good feoffment made according to the deed, and the additional words are void. So if a man make a lease for years, and make livery *secundum formam chartæ*; this is but a lease for years still. And if *A.* give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs; this is a void deed; and therefore

5B 2A 618 *Guthrie v. Auldrey* contra

(1) If a letter of attorney be made to three *conjunctim et divisim*, and two of them only make the livery, it is not good, because not pursuant to the authority: for the delegation was to them all three, or to each of them separately; but if the third was present at the time of the livery, though without doing or saying any thing, it is good. Dier 62. a. see further Mo. 278. 1 Leon. 192.

(2) See more amply as to the doctrine of livery by letter of attorney, in Vin. Abr. Feoffment (Q) Com. Dig. Feoffment (B. 3.)—and note 2 to 13th edition G. Lit. 52. a.

if

Co. 2. 55.  
5. 94. &  
Green-  
wood's case  
B. R. Mich.  
17 Jac.

Co. super  
Lit. 222.

Perk. Sect.  
42.

Perk. Sect.  
204. 203.  
H. 7. 9.

Dier 35.  
19 E. 4. 1.  
Co. 5. 95.

12 E. 4. 12

Co. super  
Lit. 21.

if the livery of seisin be made *secundum formam chartæ*, the livery of seisin is void also. But if when he doth give livery of seisin, he give it to him and his heirs without these words *secundum formam*, &c. or if in the making of livery he say, here I deliver you seisin of this land, to have and to hold to you and your heirs for ever, or the like; this may make a fee simple. And so if one make a deed of feoffment of two acres, and after make livery of seisin of four acres; in this case if there be words in the livery of seisin sufficient to make a new estate, the other two acres may pass also.

Co. 2. 55.  
5. 94. &  
Green-  
wood's case,  
B. R. Mich.  
17 Jac.

If *A.* by deed give land to *B.* to have and to hold after the death of *A.* to *B.* and his heirs; this is a void deed; and therefore if upon this deed, livery of seisin be made before the day, by the party himself, or at, or after the day by his attorney *secundum formam effectum chartæ*; the livery is void also, for it cannot enure so. And yet if a lease be made for life to begin *in futuro*, and at, or after the day come, the lessor himself in person doth make livery of seisin *secundum formam chartæ*; in this case the lease perhaps may become good by this livery of seisin.

Co. super  
lit. 222.

If an agreement be between two that the one shall infeoff the other upon condition for surety of money, and afterwards livery of seisin is made generally without any such condition; in this case it is said by some the estate shall be on condition still.

Perk. Sect.  
42.

If there be a fault in the deed, as by the mis-naming of the feoffor, &c. feoffee, &c. or the like, and afterwards the feoffor, &c. doth himself in person make livery of seisin upon this deed to the feoffee, &c. by this the fault of the deed may be holpen and cured.

Perk. Sect.  
204. 203.  
H. 7. 9.

If one make a feoffment to himself and another, and give livery of seisin to the other; this is a good feoffment, and shall enure to the other wholly, and he shall take the whole by the feoffment and the livery. And so if the livery be made to one that is capable, and to another that is not capable; he that is capable shall take the whole, and the other shall have nothing. So if a feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the survivor; in this case the livery shall enure to the survivor only, and he shall have all the estate thereby. So if a feoffment be made without deed to a corporation and to *I. S.* and livery is made to *I. S.* alone; in this case *I. S.* shall have the whole and the corporation nothing at all.

Dier 35.  
10 E. 4. 1.  
Co 5 95.

If a feoffment be made to four, and livery of seisin is made to one, two, or three of them; this shall enure to them all. But if the feoffment be without deed, it shall enure to him wholly to whom the livery is made. And if one of them give warrant to the rest to take livery for him, and they do so; this shall enure to them wholly, and not to him at all for any part.

10 E. 4. 12.

If the tenant make a feoffment to his Lord and another, and give livery of seisin to the other; this shall enure wholly to the other until the Lord agree to it, and then to them both.

Co. super  
lit. 21.

If one make a deed of feoffment of one acre of land to *A.* and his heirs, and another deed of the same land to *A.* and his heirs of his body, and deliver seisin according to the form and effect of both deeds; in this case it shall enure by moieties, *i. e.*

*Carle v. Maudslayi*  
*3 Levin 2 339*  
*aliter of the B.*  
*his heirs in the*  
*future, for then the*  
*stat. is rejected*  
*wrong*  
*Furmen v. Maudslayi*

\* P. 220.

*sc. without deed*

he

he shall have an estate tail, and the fee simple expectant in the moiety, and a fee simple in the other moiety.

If two several deeds of feoffment be made to two several persons of one and the same thing; he that can get the seisin first shall have it. *Rem domino, vel non domino, vendente duobus, in jure est potior traditione prior.*

If lessee for life make a feoffment, and a letter of attorney to the lessor to make livery, and he doth make livery accordingly; in this case this shall not enure to bar him of his entry upon the feoffee for the forfeiture of his lessee. But if lessee for years make a feoffment in fee, and such a letter of attorney to the lessor, and he doth deliver seisin accordingly; this livery shall bind him, for it shall be said as in his own right, because the lessee had no freehold whereof to make livery.

\* P. 221.

\* If a lessor make a deed of feoffment, and a letter of attorney to the lessee for years to give livery, and he doth it accordingly; this shall not be construed to extinguish or hurt his term (1). See more in *Exposition of deeds, supra, ch. 5.*

And so we come to another kind of deed of common assurance, called a *bargain and sale*.

(1) See more amply in *Com. Dig.* Feoffment (B. 5.) *Vn. Abr.* Feoffment (L.) 1 *Wood* 526. *Bac. Abr.* Feoffment (B.)—In what cases livery shall be presumed at law, or supplied in equity, see before in page 205, note 1, and further in 1 *Wood* 529. *Vn. Abr.* Feoffment (F. a.)

The reader, it is presumed, from perusing this chapter, and consulting the authors referred to in it, must be well convinced of the excellent nature of the conveyance by *feoffment with livery of seisin*. This conveyance is now but very little used (as was observed before in note 1, to p. 200.) but it is still nevertheless a formal, valid, and effectual mode of conveyance; it has however been of late years almost entirely superseded by the conveyance by *lease and release*.—The editor apprehends he cannot explain this circumstance, and the origin and nature of the conveyance by *lease and release*, more satisfactorily to the reader, than by selecting particular passages from some of our most respectable legal writers, in the order of time in which they have written concerning it.—*Ld. Bacon* in his *Treatise on the use of the law*, p. 154. speaking of the inconveniencies of the putting lands into use before the statute of uses, and the frauds which were occasioned thereby, says, that “in the end of 27 H. 8. the parliament purposing to “take away all those uses, and reduce the law to the ancient form of conveying of lands by public livery of seisin, fine, and recovery, did ordain, that where lands were put in trust or use, there the possession “and estate should be presently carried out of the friends in trust, and settled and invested on him that “had the use, for such term and time as he had the use.”

In *Dalruple on Feuds*, p. 210, it is said, in England, although originally conveyances by deed of party were executed by acts of infeoffment; which, as will appear from a comparison of *Madox and Craig*, correspond in their nature and progress to our (*Scottish*) charter and seisin; or by fines, which were originally an acknowledgment of such feoffment in a court of record; yet, earlier than the time of *Littleton* it had come into fashion, to transmit land by *attornment*, if there was a tenant, and by *lease and release*, if there was none; in the first of which cases, the form of getting the consent of the tenant of the ground to the transfer supplied the place of that livery, which could not be given; and, in the other case, the grantor gave to the grantee an imaginary lease, in order to put him into possession, and the next minute released; or, in the language of the law of *Scotland*, renounced all right or interest he had in the land.

In attornment something was done to supply the want of livery, and in lease and release the entry gave livery; but a statute of *Henry 8.* by making provisions concerning a form of conveyance, which had been before in use, enabled people to dispense with these two shadows of a form, and with the circuit of a feoffment altogether. The form of conveyance by bargain and sale, made secure by writing and enrolment, by virtue of this statute, corresponds to the disposition without infeoffment in *Scotland*: This last with us doth not transfer; it is only a step to the transfer; but in *England*, on a bargain and sale, all notion of a superior or delivery is lost: the moment the deed is inrolled, the estate, to almost all effects whatever, is vested *ab initio*; nor can there be any dispute between competitor purchasers, except what arises from the dates of their respective enrolments.

In 1 *Wood's Conveyancing*, p. 714, a conveyance by lease and release is described to be, where he who is to convey any lands or tenements first makes a *lease*, (or *bargain and sale*) of the premises to the person to whom he same is to be conveyed for six months, a year, &c. but usually for a year, to the intent that by virtue thereof the lessee may be in the actual possession of the premises granted by the lease, (or bargain and sale) and intended to be released to him; and then the lessee (or bargainee) by virtue of the statute of the 27 H. 8. c. 10. for transferring uses into possession, is enabled to take a grant or release of the reversion or inheritance of the said lands, to the use of himself and his heirs for ever, &c. and then a



*release* (usually dated the day next after the date of the lease, reciting the said lease and declaring the *uses*) is accordingly made; which in this case is a conveyance of one's right or interest that he has in a thing to another who has the possession thereof.

A lease and release are but one conveyance, and in the nature of one deed, 2 *Mod.* 252. Lease and release is now become the most common conveyance of lands. It amounts to a *feoffment*; for by the said statute the *uses* are transferred into the *possession*, so that thereby the place of *livery of seisin* is supplied; which indeed saves much trouble, especially when the bargainor, &c. lives at a distance from the premises: in which case a letter of attorney to make livery was obliged to be made; otherwise the bargainor, &c. was to deliver seisin in person.

Mr. Justice *Blackstone* treating of the statute of uses (in the second volume of his commentaries p. 337.) says, the only service to which that statute is now confined is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only antient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. And in the same volume p. 339. describing the conveyance by lease and release says, that mode of conveyance was first invented by serjeant *Moore*, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as particularly Mr. *Noy*) have formerly doubted it's validity. It is thus contrived. A lease or rather bargain and sale upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrollment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the *possession*. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before, must be made to a tenant in possession; and accordingly, the next day, a release is granted to him. This is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment.

Mr. *Hargrave* in note 3. to the 13th edition *Coke Littleton* 48. a. says—but since the introduction of uses and trusts and the statute of 27 H. 8. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses equitable estates of freehold might be created through the medium of trusts without livery, and by the operation of the statute *legal* estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of freehold, and that a freehold of such things as do not lye in grant would become transferrable by *parol* only without any solemnity whatever. To prevent the inconveniencies, which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of enrollment for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from omitting to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The conveyances from this insufficiency of the statute of enrollments are now in some measure prevented by the 29 Cha. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts on them, otherwise than by writing. See further as to the nature and operation of the conveyance by lease and release, in the case of *Barker v. Keat*, 2 *Mod.* 249.—*Shortridge v. Langplugh*, *Ld. Raym.* 798.—*Lilly's Pract. Convey.* 227. *Bar. Abr.* Release (C. 4.)—*Zouch v. Parsons*, 3 *Burr.* 1794. *Vin. Abr.* Deeds (D.)

## C H A P. X.

## Of a Bargain and Sale.

1. Bargain  
and sale.  
*Quid.*

**T**HIS word doth signify the transferring of the property of a thing, from one to another, upon valuable consideration. And herein only it doth differ from a gift; that this may be without any consideration or cause at all, and that hath always some meritorious cause moving it, and cannot be without it. This word also is sometimes applied to the assurance or conveyance whereby this is done and made, which is called a deed of bargain and sale, for this may be done by writing or without writing (1).

2. *Quatuorplex.*

And sometimes this is and may be of lands, tenements, and hereditaments, and to this the term is most properly applied. And then it is said to be, where a recompence is given by both parties to the bargain. As where one doth bargain and sell his land to another for money; in this case the land is a recompence to the one for the money, and the money to the other for the land. And this now also is become one of the common assurances of the kingdom; so that such an assurance may now be averred to be fraudulent within the statute of 27 *Eliz.* as well as any other assurance, a rent may be reserved upon it, or a condition made by it, as well as by any other kind of assurance. And sometimes this is and may be of moveable things, as trees, corn, grass, oxen, kine, household-stuff, and the like: the property whereof is and may be altered by this kind of conveyance, as well as by gift, or grant. And this kind of bargain and sale is that which is commonly called a contract: which, largely taken, is an agreement between two or more concerning something to be done, whereby both parties are bound each to other, or one is bound to the other. But strictly, it is the buying and selling of some personal goods whereby the property is altered. And in both these cases he that doth sell is called the bargainer, and he to whom the sale is made is called the bargainee.

Bargainer.  
Bargainee.  
3. The effect  
of it.

The effect of this is to transfer the property; and this it will as effectually do as any other kind of conveyance whatsoever. And therefore the bargainee of a reversion, howsoever he may not have benefit of a condition upon the demand of a rent without giving notice of the bargain and sale to the lessee; and howsoever if *A.* conusee by a fine of a reversion, before attornment of the tenant bargain and sell the reversion to *B.* that *B.* cannot distrain for this rent until he can get an attornment of the tenant; yet the bargainee shall have benefit of a condition as an assignee within the statute of

(1) Bargain and sale is termed a *real contract* on a valuable consideration, for passing manors, lands, tenements or hereditaments, by deed indented and inrolled within six months after the date thereof, without livery of seisin, or attornment of tenants. 2 *Inq.* 672. Bargain and sale is a contract in consideration of money, passing an estate in lands and tenements by deed indented and inrolled: this manner of conveying lands is created and established by the 27 *H. 8. c. 10.* which executes all uses raised; and as this has introduced a more secret way of conveyancing than was known to the policy of the common law, therefore the inrollment of the deed of bargain and sale was made necessary by the 27 *H. 8. c. 16.* *Bac. Abr.* Bargain and Sale. See further in *Lilly's Conv.* 12. and 1 *Wood* 650.

See West  
Symb. tit.  
Bargain and  
Sale.

6 *Jac. B. R.*  
Adjudged  
21 *H. 6.* 43.  
per Yelver-  
ton.  
Stat. 27 *H.*  
8. ch. 16.

Co. 8. 94.  
7. 40. 2.  
35.

*Bac. Ab.*  
472

Per Chief  
Just. Hide  
3 *Car.*  
Co. 2. 54.

Terms of  
the law.  
Agreement.

(1) It is fa-  
in right of n-  
indented and  
ment or fine  
by bargain  
possession. C  
bargainor? but  
bargain and  
(2) As to  
Grants (C).  
(3) *A.* by  
was held to  
a thing whic  
no one can b  
*Bac. Abr.* B  
(4) And  
stone, lead,  
(5) For a  
8. c. 16. and  
2. 10. trans-  
(6) See a  
141.  
sale are ack-  
them, they

32 H. 8. And it seems he may vouch by force of a warranty annexed to the estate of the land, because he is in partly in the *per*, and partly in the *post* (1).

See West  
Symb. tit.  
Bargain and  
Sale.

All things for the most part, that are grantable by any other way from one man to another, are grantable and may be transferred by way of bargain and sale from one to another. And therefore lands, rents, advowsons, commons, tithes, profits of courts, and the like, may be granted by way of bargain and sale in fee simple, fee tail, for life, or years. And all manner of goods and chattels, as leases for years, wardships, cattle, corn, household-stuff, wood, trees, merchandises, and the like, are grantable by way of bargain and sale (2). But it seems estovers, and such like things *de novo*, and that have not essence before, are not grantable by way of bargain and sale, as they are by way of grant or lease, and therefore that a bargain and sale of such things is void (3).

4 Of what  
things a bar-  
gain and sale  
may be: or  
not.

6 Jac. B. R.  
Adjudged  
21 H. 6. 43.  
per Yelver-  
ton.  
Stat. 27 H.  
8. ch. 16.

If any estate of freehold or inheritance be made of land by way of bargain and sale, the same must be made by a writing or deed indented (4), and cannot be made by word of mouth only, as a lease for years, whether it be created *de novo*, or be in *esse* before, may be. But lands in London by a special proviso within the statute may be bargained and sold by word of mouth without any writing (5).  
2. The very words bargain and sell, are not necessary to a good bargain and sale; for words equivalent will suffice to make land pass by way of bargain and sale. And therefore if a man seised of land in fee do by deed indented, and by the words alien or grant, sell them to another; or if such a man covenant to stand seised of his land to the use of another; and these deeds are made in consideration of money, and the deeds be after inrolled; these will amount to good bargains and sales. And if a man by a deed indented and inrolled in consideration of ten pounds paid to him, by the words, demise and grant, pass his lands to another for twenty years; this is a good bargain and sale (6).

5. What shall  
be said a  
good bargain  
and sale: and  
what things  
are requisite  
to make such  
a bargain  
and sale: or  
not.  
Of lands.

Co. 8. 94.  
7. 40. 2.  
35.  
Bac. 41.  
472

(1) It is said that a bargain and sale is not so strong a conveyance as a livery; for if I have a rent charge in right of my wife out of the manor of D. and afterwards I purchase the manor, and afterwards by deed indented and inrolled I bargain and sell the manor, the rent charge shall not pass. 1 Leon. 6. By feoffment or fine all uses and possibilities are conveyed by reason of the forceable operation, but it is otherwise by bargain and sale. See 1 Leon. 33.—The bargain and sale vests the use, and the stat. of uses the possession. Cro. Jac. 696. A bargain and sale does not pass away nor affect a contingent use in the bargainor; but a feoffment or fine would transfer it. Hardr. 416. See more amply as to the operation of a bargain and sale, 1 Wood 651. Com. Dig. Bargain and Sale (B. 3.) 2 Bl. Com. 338. Vin. Abr. Deeds (A).  
(2) As to bargains and sales of goods and chattels, see Com. Dig. Bargain and Sale (A.) Biens (D. 3) Grants (C).

(3) A. by indenture inrolled bargains and sells to B. in fee with a way over other lands of A. the deed was held to be void as to the way, for nothing but the use passed by the deed, and there cannot be an use of a thing which is not in *esse*, as a way, common, &c. which are newly created, and until they are created, no use can be raised by bargain and sale. Cro. Jac. 189. See further what may be bargained and sold, Bac. Abr. Bargain and Sale (B). Com. Dig. Bargain and Sale (B.) Vin. Abr. Bargain and Sale (G).

(4) And not by print or stamp, and it must be written on parchment or paper, and not upon wood, stone, lead, or other material. 2 Inst. 672. Sanderson & Jackson 2 B. & C. 258.

(5) For a valuable consideration; lands in the city of London being exempted out of the statute 27 H. 8. c. 16. and at the common law such a bargain and sale by word only raised an use, and the stat. 27 H. 8. c. 10. transfers the use into possession. 2 Inst. 275. Vin. Abr. Deeds (H).

(6) See accordingly the words demise and grant adjudged a good bargain and sale without other words. West 141. See also Taylor v Vale, Cro. Eliz. 166. and Cro. Jac. 210. but tho' the words bargain and sale are acknowledged by Lord Coke not to be absolutely necessary, yet he says it is good to make use of them, they being contained in the act. 2 Inst. 672.

3. There



*Baker's Kent*  
2 Mod. 249

\* P. 223.  
Averment.

Inrollment,  
where ne-  
cessary: and  
how it must  
be done.

3. There must be some good consideration given, or at least said to be given for the land. And therefore if *A.* (for divers good considerations) <sup>a</sup> or (in consideration that the bargainee is bound for the bargainor, and for divers other good causes) <sup>b</sup> or (for divers great and valuable considerations) bargain and sell his land by deed indented and inrolled to *B.* and his heirs; *nihil operatur*. But if in these cases in truth there be money or other good consideration given, albeit it be not expressed upon the deed \* the bargainee may aver it, and being proved, the bargain will be good. And if the deed make mention of money paid, as in consideration of an hundred pounds, or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this which is expressly affirmed by the deed. And if the deed mention and say (for a certain sum of money) or (for a certain competent sum of money) these are good considerations (1). 4. There needs no livery of seisin or attornment in this case. And therefore if one bargain and sell a reversion by deed indented and inrolled, for good consideration; the reversion will pass without any attornment of the tenant. And if it be only a lease for years of a reversion that is granted, there needs no attornment nor inrolment. And in case of a bargain and sale, the bargainee is in actual possession before any entry, so that the lessee may attorn to the grant of the reversion, as hath been ruled in *Mitton's case Mich. 18 Jac. in Cur' Ward*, by the two Chief Justices and the whole court. And yet I think he hath not such a possession as to bring any possessory action for trespass, or the like, until an actual entry: for where the statute of 27 H. 8. of uses provides, that the actual possession shall be adjudged according to the use, yet it ought to have a circumstance which is requisite by the common law, *viz.* an actual entry in deed. But there must be an inrollment of the deed in case where any freehold doth pass (2): for it is provided, that no lands (except in some corporations only) shall pass from one to another by any deed whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, by reason only of any bargain and sale thereof, except the same be made and done by writing indented, sealed and inrolled in one of the four courts [the Chancery, King's Bench, Common Pleas, or Exchequer, or else within the same county or counties where the lands so bargained and sold, do lie, before the *Custos Rotulorum*, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof

(1) If I bargain and sell land to my son, no uses arise unless there be a consideration of money; for selling, *ex vi termini*, supposes my transferring a right of something for money, the common medium of commerce. And if there be no such consideration, it may be an exchange, a covenant to stand seized, a grant &c. but it can be no sale. Treatise of equity p. 56. If the deed expresses for a competent sum of money, tho' the certainty of the sum be not mentioned, it is good enough; for against this express mention in the deed no averment nor evidence shall be admitted. *Mo 569. Fisher v. Smith*. See more amply what shall be a sufficient consideration, in *Com. Dig. Bargain and Sale (B. 11.) Bac. Abr. Bargain and Sale (D)*.

(2) And until the inrolment the lands remain in the bargainor; for the bargain and sale on the statute 27. H. 8. ch. 16. is but *inchoatum* and *non perfectum*, and gives nothing to the bargainee till the deed is inrolled, according to the statute *Vin. Abr. Deeds (N.)* the statute of inrolment extends only to a bargain and sale of an estate of freehold, and the omission in that statute (it not being made to extend to bargains and sales for terms of years) has occasioned the invention of the conveyance by lease and release, now so universally in practice, as was before observed, in page 217.

Co. 1. 176.  
a Ward v. Lambert Pasche 37 Eliz. 41 El. Ad. judged.  
Dier 169.

Dier 90.

Co. 7. 40.  
8. 94.

Co. 5. 111.

Stat. 27 H. 8. ch. 16.  
Pl. 307.

Chap. 1

Co. 5. 1.  
a] Dier 218  
Adjudged  
Franklin &  
Garter's ca  
Mich. 37.  
38 Eliz.  
a] Dier 218  
Ruled in th  
court of  
Wards.  
Co. 11. 48

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"provisi us  
"1 Mod 65

the clerk of the peace to be one (1). And the same inrolment to be within six months next after the same writing or deed is dated. And this statute was made in the same parliament wherein the law of transferring of uses into possession was made, to the end that men's lands might not suddenly and privately pass upon payment of a little money in an alehouse, or the like. And herein these things must be observed, 1. The inrolment upon such a deed as to make the estate to pass, must be in parchment; for an inrolment in paper is not good (2). 2. The deed inrolled must be indented; for if it be but poll, the estate will not pass. 3. It must be inrolled within six months of the purchase or sale. And this account must be.

Co. 5. 1.

21 Dier 218.

Adjudged

Franklin &amp;

Garter's case

Mich. 37. &amp;

38 Eliz.

21 Dier 218.

Ruled in the

court of

Wards.

Co. 11. 48.

1. From the date, and not from the time of the \* delivery of the \* deed. 2. After twenty eight days to the month and no more (3). 3. The day of the date to be taken exclusive, and for none of the days of the six months. And yet if a deed be inrolled the same day it bears date, it is good. 4. If it be inrolled any part of the last day of the six months, it is sufficient. And thus the deed may be inrolled within the six months, albeit either of the parties die within the time. And if the deed be not thus inrolled, it is of no force at all (4). So that if one bargain and sell his land to me, and

(1) By the stat. 5th Eliz. c. 26. bargains and sales may be inrolled in the counties palatine of Lancaster, Chester, and the bishoprick of Durham, of manors, lands, &c. within the county of Lancaster, the county of Chester, or the county of the bishoprick of Durham respectively.—By 5th. Anne ch. 18. bargains and sales of any manors, lands, &c. within the West-riding of the county of York, which shall be inrolled before the register for the said West-riding, or his deputy for the time being, in the public office at Wakefield, shall be as good and available, as if the same had been inrolled in one of the King's courts of record at Westminster, or before the Cusles Rotulorum, and two justices of the peace, and the clerk of the peace of the said West-riding, or two of them, according to the act of the 27th H. 8.—By the 6th. Ann. c. 35. §. 16. The like provision is made for inrolling bargains and sales in Beverley of lands within the East-riding of the county of York, or the town and county of the town of Kingston upon Hull; and by the 30th. sect. of that stat. it is enacted, “that in all deeds of bargain and sale inrolled in pursuance of that act, whereby any estate of inheritance and fee simple is limited to the bargainee and his heirs, the words grant, bargain and sell, shall amount to, and be construed and adjudged in all courts of judicature, to be express covenants to the bargainee, his heirs and assigns, from the bargainor for himself, his heirs, executors, and administrators, that the bargainor, notwithstanding any act done by him, was at the time of the execution of such deed seized of the hereditaments and premises thereby granted, bargained and sold, of an indefeasible estate in fee simple, free from all incumbrances (rents and services due to the Lord of the fee only excepted) and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him; unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators and assigns respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale.”—By the 8th. Geo. 2. c. 6. §. 21. the inrolment of bargain and sales of lands in the North-riding of the county of York is authorized in the register office for that Riding.—By the 33 Geo. 2. c. 30. §. 10. being an act for widening certain streets, &c. in London, it is enacted, that all bargains and sales made and acknowledged by any person or persons whomsoever, and which shall be inrolled in the hushings of the said city, of any lands, tenements, and hereditaments, purchased by virtue of and for the purposes of that act, shall have the force, effect and operation in law, to all intents and purposes, which any fine or fines, recovery or recoveries whatsoever, would have, if levied or suffered by the bargainor or bargainors, or any person or persons seized of any estate in the premises, in trust for, or to the use of, such bargainor or bargainors, in any legal manner or form whatsoever.

(2) And by the 10th. Ann. c. 18. §. 3. a copy of the inrolment of a bargain and sale, examined with the inrolment, and signed by the proper officer, having the custody of such inrolment, and proved upon oath to be a true copy so examined and signed, shall, in all cases where a bargain and sale shall be pleaded with a *profer in curia*, be of the same force and effect, as the indenture of bargain and sale should be, if the same was produced.

(3) See accordingly 2 Inst. 274.

(4) But if it is so made and duly inrolled, it is not effectual if the bargainor had any legal disability, for if an infant bargains and sells lands by deed indented and inrolled, he may avoid it when he will, (altho' in the case of a fine he must reverse it during his minority) for this deed was of no effect to raise an use, and the statute of inrolments is intended only of effectual bargains and sales, 2 Inst. 673.—As to inrolments in various places, and the different forms of inrolments, see Lilly's Convey. 21. Vin. Abr. Deeds (K.) 1 W and 634.

Of goods and  
chattles.

the trees upon it ; in this case, albeit the trees might have been sold alone by deed without inrollment, yet now being not inrolled, because the sale is not good for the land, it shall not be good for the trees also. And no subsequent act will help in this case: for if one by words of bargain and sale only, without any other words in the deed, grant a reversion, and the deed be not inrolled, and after the tenant doth attorn ; hereby nothing doth pass, neither shall it enure as a confirmation. But yet this must be noted, that in some cases, where a deed will not enure by way of bargain and sale for some of the causes aforesaid, it may enure to some other purposes. A bargain and sale may be made of goods and chattles, without any such solemnity as before ; for it may be by word as well as by writing, with or without any words of bargain and sale, as well as by those words ; by a deed poll, as well as by a deed indented ; and that without any inrolment at all, and without any delivery of any part of the things sold, or of any piece of money, (as the manner is) in the name of seisin. But in this case also some respect is to be had unto the cause and consideration of the bargain, as well as in the case of the bargain and sale of lands. For howsoever perhaps in the case of a grant, or bargain and sale, of goods, or chattles, by deed in writing, the consideration is not material. And that if a man do by his deed under his hand and seal, bargain and sell timber trees, or any other thing, without any consideration at all, the same may pass well enough ; yet if the contract be by word, or by writing sealed and not delivered, if there be no consideration or no good consideration of it, it is of no effect at all. And therefore if a man by word of mouth sell to me his horse, or any other thing, and I give him or promise him nothing for it ; this is void and will not alter the property of the thing sold. But if one sell me a horse, or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money ; or all, or part of the money is paid in hand ; or I give earnest money (albeit it be but a penny) to the seller ; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a good bargain and sale of the thing to alter the property thereof : and in the first case I may have an action for the thing, and the seller for his money ; in the second case I may sue for and recover the thing bought ; in the third I may sue for the thing bought, and the seller for the residue of the money ; in the fourth case where earnest is given we may have reciprocal remedies one against another ; and in the last case the seller may sue for his money. If *A.* sell cloth to *B.* for ten shillings, and *B.* takes away the cloth against the will of *A.* in this case *A.* shall have an action of trespass against *B.* And if *A.* sell cloth to *B.* for ten shillings in his election to make it a bargain or not, and if he will he may keep his cloth until the other pay him, and if *A.* say nothing, but doth suffer *B.* to take it away ; he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a market or fair, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another ; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money ; in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards

\* P. 225.

Co. 1. 87.  
Super Lit.  
10 Dier  
169.  
Dier 155.

Co. 6. 33.

Helw. 87.  
Plow. 140.  
41.

Plow. 86.  
2 H. 8. 27.  
Bro. Con-  
tract. 4.

27 Aff. 29.

Dier 29, 30.  
14 H. 8. 19.  
9 H. 7. 21.  
21 H. 7. 6.  
10 H. 7. 6.  
Plow. 431.

Co. 4. 71.  
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Dier 218.

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afterwards to another, and upon the payment, or tender and refusal of the money agreed upon, I may take or recover the things.

If one do bargain and sell his land to me for money, to have and to hold to me generally, and doth not say to me and my heirs; by this I have but an estate for life and no more.

If one in consideration of ten pounds paid by me doth bargain and sell his land to me and my heirs, to have and to hold to me to the use of the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *Habendum* in this case is void, and I and my heirs shall have the land for ever (1).

If one in consideration of ten pounds sell me land for the term of twenty years, and doth not say when this term shall begin; in this case it shall begin presently. See more in *Exposition of deeds*, chap. 5. in toto (2).

If one sell me any thing by the tod, pound, bushel, yard, or ell; it shall be accounted measured, and reckoned according to the custom of the country and place, and not according to the statutes or the measures of other countries.

If one sell me twenty barrels of ale, or ten pottles, or cups of wine; by these bargains I shall not have the barrels, pottles, or cups, with the ale or the wine. But if one sell me a hoghead, or a firkin of wine, it seems by this bargain I shall have the hoghead and firkin with the wine.

If one sell me all his trees in such a wood, and that I shall not cut them until *Michaelmas*, and in the interim hawks do breed in the trees; it seems in this case that the vendor shall have them, and that I may not meddle with them. And yet see *Co. 11. 58.* \* P. 226. which seems to be to the contrary.

The inrolment of a deed of bargain and sale, when it is done within the six months, shall to most purposes relate to the time of the delivery or of the date of the deed. And it is given as a rule, that it shall have relation to the time of the delivery of the deed, viz. to avoid all mean estates and charges made to a stranger by the bargainor after the delivery of the deed before the inrolment, but not to defeat any estate lawfully settled in the interim in the bargainee himself. And therefore if one bargain and sell his land by deed indented to one, and after, before the deed is inrolled, he enter into a statute, or grant a rent-charge out of this land, or make a lease of the land to another, and then the deed is inrolled within the time; in this case the relation shall avoid all the mean charges and estates. And if *A.* bargain and sell his land by deed indented to *B.* and afterwards doth sell the same land by deed indented to *C.* and the deed made to *C.* is first inrolled, and then the deed made to *B.* is inrolled also within the six months; in this case *B.* shall have the land, and the relation of his inrolment shall make the inrolment of the other deed void (3). So

6. How a bargain and sale shall be taken.

Of lands.

Of goods.

7. How and to what purposes a deed of bargain and sale of lands and the inrolment thereupon shall relate. And how and to what purposes it shall not.

*Ballingh v. Allott*, determined on the ground of this act.

(1) See the case in *Dier*. See also *Ash v. Gallen*, 1 *Ca. in Chan.* 114.

(2) A covenant in a bargain and sale not inrolled is binding. 1 *Ld. Raym.* 388. Though after the inrolment and acknowledgment the bargainor or bargainee dies before the inrolment yet the land passeth, *Wood's Inst.* 259. 2 *Inst.* 674.

(3) Accordingly in *Wood's Inst.* 259. if two bargains and sales are made of the same lands to two several persons, and the last deed is first inrolled, and afterwards the first deed is also inrolled within six months, the first buyer shall have the land: for when the deed is inrolled, the bargainee is seized of the land from the delivery of the deed, and the inrolment shall relate to it. See further *Mo.* 41. *Cro. Jac.* 63. 409. *Noy* 106. if a man bargains and sells to *A.* and afterwards makes a bargain and sale of the same land to *B.* and the deed to *B.* is first inrolled, but the deed to *A.* is not inrolled within six months, the bargain and sale is good; but if the deed to *A.* had been inrolled within the six months, the deed to *B.* had been void. *H.b.* 165.

if *A.* levy a fine of the land to *C.* yet *B.* shall have the land. But *Curia. M. 3.* if the first deed made to *B.* be not inrolled within the six months, *Jac. B. R.* and the deed to *C.* be inrolled within the six months, *contra.*

If *A.* bargain and sell land to *B.* and after levy a fine to *B.* of *Co. 4. 71.* the same land, and after within the six months the deed is inrolled; in this case *B.* shall take by the fine, and not by the bargain and sale (1).

If one jointenant alien all his lands in *Dale* to *A.* and before the inrolment the other jointenant die, and after the deed is inrolled; in this case but a moiety, and not the whole land doth pass (2).

Bankrupt.

If *A.* bargain and sell his land to *B.* and after this *A.* doth become bankrupt, and the commissioners sell the land to *C.* and after the deed is inrolled within six months; in this case *B.* and not *C.* the purchaser shall have the land (3).

Ward.

If *A.* bargain and sell his land held in *capite* to *B.* in fee, and *B.* die before inrolment, and then the deed is inrolled; in this case the heir of *B.* shall be in ward. And so was it held by all the justices in *Sir Walter Earl's* case, *Pasch. 15 Jac. Curia Ward.*

See note on page x

Dower.

And yet in this the wife of the bargainee shall not have dower, as was held by *Anderson* chief justice, and justice *Walmesley* 3 *Jac. Co.*

Rent.

*B.* and again in *Sir Robert Barker's* case, 6 *Jac.* And if one bargain and sell his land to *I. S.* and after this the rent incur; and then the deed is inrolled; the bargainee, and not the bargainor, shall have the rent. *Per curiam B. R. Hil. 11 Car.*

If *A.* bargain and sell his land to *B.* in fee, and then marry *C.* and die, and *C.* is endowed, and after the deed is inrolled; in this case the dower of the woman shall be taken away by relation, as was held in *baron Frevil's* case, 22 *Eliz. Co. B. (4).*

If *A.* bargain and sell his land to *B.* and *C.* in fee, and *B.* release to *C.* before the inrolment; this release is void:

If *A.* disseisor bargain and sell the land disseised to *B.* in fee, and the disseisee doth release to the bargainor, and after the deed is inrolled; in this case this release shall avail *B.* (5).

If *A.* bargain and sell his land to *B.* and *B.* before inrolment doth bargain and sell the land to *C.* the first deed is inrolled, and then the second deed is inrolled: in this case the last bargain and sale is void, and shall not be made good by relation, as was held by the court in *Sir Robert Barker's* case.

(1) For when the fee simple passed by the fine to the donee and his heirs, the inrolment of the deed afterwards could not divest and turn the estate out of himself which was absolutely settled in him by the fine; for then, where he was in before in the *per*, he would be now in the *post*. 4 *Co. 71. a.*—Bargainee may suffer a recovery before inrolment, for he is a good tenant to the *præcipe*; and this is said to be warranted by practice. 1 *Vent. 361. Perry v. Bowes. Vin. Abr. Deeds (N.) pl. 5. 2 Inst. 675. Selwyn v. Selwyn, 2 Burr. 1131.*

(2) For the inrolment had relation to the making and delivery of the deed; so that it shall give nothing but that which was sold by it at the time of the delivery of the deed. *Vin. Abr. Deeds (K.) pl. 6.*

(3) As to the power of the commissioners over the real estate of the bankrupt, and in what manner the sale thereof shall be made by them, see stat. 13th. *Eliz. c. 7. 21 Jac. c. 19. 2 Bl. Com. 285. Green's Bankrupt Laws 189.*

(4) But relation in several cases shall aid acts in law, as in case of dower, &c. tho' not acts of parties, viz. to make void acts of the parties good, by relation or fiction of law. 3 *Co. 29. a. Co. Lit. 150. a.*

(5) If a disseisor bargains and sells land, and the disseisee releases to bargainee before inrolment, it is void. *Arg. Roll. R. 425.* says it was so adjudged *Mich. 10 Eliz. Mocket's* case. But a release to the disseisor before inrolment had been good, and then the inrolment should pass the estate to the bargainee, and he should take advantage of the release. 1 *Roll. Rep. 425. Mich. 14 Jac. in pl. 16. Vin. Abr. Deeds (O.) pl. 11.*

So was it held in *Sir Christopher Hatton's* case.

So hath it been adjudged.

(1) See what cases Sale (K. t)

And this is the Statute of Dower.

Contrarium tent. per Just. Berkeley, Hil. 11 Car.

10 *Car. 31. Vaughan & Bannister*

22 *Eliz.*

3 *Jac. Co. B.*

So held in *Mocket's* case 10 *El.*

6 *Jac.*

So was it held in Sir Christopher Hatton's case.

If a lease be made rendering rent, on condition to re-enter for non-payment, and the lessor bargain and sell the reversion by deed indented, and after the deed made the rent is in arrear, and then the deed is inrolled: in this case it shall not relate to give a re-entry for the condition broken.

So hath it been adjudged.

If *A* bargain and sell land to *B*. in tail, and *B*. before inrolment of the deed, doth make a lease according to the statute of 32 *H.* 8: and after the deed is inrolled: this is a good lease (1).

And now we come to a gift.

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(1) See more amply, as to the operation of a bargain and sale, and of the inrolment thereof, and in what cases and in what manner it shall relate. *Bac. Abr.* Bargain and Sale (E.) *Vin. Abr.* Bargain and Sale (K. to N.) Inrolment (E.) *Cqm. Dig.* Bargain and Sale (B. 9)

*shall this be? "A dieth & the heir of A shall be in ward." It is so held in Brook's Reading on the Statute of Limitations (see Saunders on Wills 2.55 n.) & then "the wife of the bargainer shall suffer her dower." 352*

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Q

CHAP.



## C H A P. XI.

## Of a Gift.

Gift. *Quid.*

**T**HIS word, importing no more than the transferring of the property of a thing from one to another, is of larger extent than a feoffment, which is always applied to an immoveable thing; for this is often applied to moveable things also, as trees, cattle, household-stuff, &c. the property whereof is and may be altered as well by gift, as by sale or grant. And in this sense a gift is sometimes by the act of the party; as when one man doth give a thing to another. And this is, or may be, either by word or by writing (1). And sometimes it is by act of law; as when a woman is married to a husband, or one is made executor to another; in these cases by the marriage only, or the taking of the executorship, the law gives all the goods of the woman to the husband, and of the testator to his executor. So where one doth take my goods as a trespasser, and I recover damages for them upon a suit in law; in this case the law doth give him the property of the goods, because he hath paid for them. But this word gift is sometimes taken more \* strictly, and applied to a conveyance or passing of an estate of lands or tenements to another in tail, wherein this word *Dedi* is most commonly used (2). And then, he which doth so give the land is called the donor, and he to whom it is given, the donee. And this for the most part is by deed, though it may be otherwise. And for these deeds of gift, of immoveable or moveable things, see *deed* and *grant in toto*, wherein all the learning touching this matter is involved.

\* P. 228.

Donor.

Donee.

And so we pass to a *Grant*.

(1) By the civil law a gift of *goods* is not good without delivery, yet in our law it is otherwise. *per Coke Ch. J. 1 Roll. Rep. 61.*

(2) The conveyance by *gift donatio*, is properly applied to the creation of an estate tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee simple. And this is the only distinction that *Littleton* seems to take, when he says "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee," *viz.* feoffor is applied to a feoffment in fee simple; donor to a gift in tail; and lessor to a lease for life, or for years, or at will. 2 *Bl. Com.* 316. See further as to a gift, in 1 *Wood* 116. 659. *Er. Abr. Done. Vin. Abr. Gift.*

## C H A P. XII.

## Of a Grant.

Co. super  
Lit. 172. 9.  
Finchellay  
29.

**T**HIS word is taken largely, where any thing is granted or *Grant. Quid.* passed from one to another. And in this sence it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like, for he that doth give, or sell, doth grant also. And thus it is sometimes in writing or by deed, and sometimes it is by word without writing. But the word being taken more strictly and properly, it is the grant, conveyance, or gift by writing, of such an incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed. Or it is the grant of such persons as cannot pass any thing from them but by deed, as the King, bodies corporate, &c. And this albeit it may be made by other words, yet it is most commonly made by this word [grant] as being most proper to this purpose. Know therefore that amongst hereditaments, some are such as are said to lie in livery, *i. e.* such as whereof livery of seisin may be made, as manors, houses, lands, &c. And some are such as do not lie in livery, *i. e.* whereof no livery of seisin can, nor need to be made, but they pass by the delivery of the deed without any more; and of this sort are rents, reversions, services, advowsons in gross, and the like, which things cannot pass from man to man without deed, or matter of record, which is of a higher nature than a deed (1). And he that makes this grant is called the grantor, and he to whom it is made is called the grantee.

Co. super  
Lit. 49.

It is taken here in the largest sence as that which doth comprehend both. And so some grants are of the land or soil itself: and some are of some profit to be taken out of or from the soil, as rent, common, &c. And some are of goods and chattles: and some are of other things, as authorities, elections, &c. And they are made sometimes by matter of record, and sometimes by \* deed or writing in the country, and sometimes by word without either. Some grants also tend to charge the grantor with something he was not charged with before; and some to pass something out of him to the grantee; and some tend to discharge the grantee of something, wherewith he was charged or chargeable before, and whereof he is now hereby discharged (2).

Grantor.  
Grantee.

2. Quotuplex.

\* P. 229.

Co. 11. 73.  
Plow. 555.

Regularly these things are requisite in every good grant or gift

1. That there be a grantor, donor, &c. and that he be a person able to grant, and not disabled by any legal or natural impediment.
3. Things necessarily requisite to every good grant.

(1) On this difference between things corporeal and incorporeal, it hath been held, that there can be no discontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowson, common, or remainder or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with warranty, that these acts work no discontinuance of the entail, for nothing passes but during the life of the tenant in tail, which is lawful. *Co. Lit.* 327. b. 3 *Co.* 81. b. Also of things which may be transferred without the notoriety of livery of seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any act in *Pais* forfeit them. *Bac. Abr.* Grants.—See further, as to the nature of a grant, in 2 *Bl. Com.* 317. *Vin. Abr.* Grants (A. 2.)

(2) See accordingly 1 *Wood* 660. *Shep. Law of Assur.* 150.

ment. 2. That there be a grantee, donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That there be a thing granted, and that the thing be such a thing as is grantable. 4. That it be granted in that order and manner that law requireth: as where the thing is not grantable without deed, that it be done by deed. And if it be by deed, that the deed have apt words to describe and set forth the person of the grantor and grantee, and thing granted, &c. and that all necessary circumstances, as sealing, and delivery, and livery of seisin, and attornment where it is needful, be observed. 5. That there be an agreement to, and acceptance of, the grant or thing granted by him to whom it is made: and for default in either of these particulars a grant may be void. *In acquirendo rerum dominio scilicet quod donationes non valent licet sint inceptæ nisi sint perfectæ.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it; in this case the grant may be good, notwithstanding some legal defect in some of these particulars.

4. What shall be said a good and sufficient grant, gift, or sale: or not.  
1. For the manner of it: and what may be granted without deed: or not: and how.  
Rents, services, &c.

Corporations, as Dean and Chapter, Mayor and Communalty, and such like, regularly can neither grant lands, goods, or chattels, but it must be by deed. But the grantees of such persons, and all other common persons, may grant or give any thing which doth lie in livery, as manors, houses, lands, and such like things, in fee simple, fee tail, for life, for years, or at will, by word without deed. And if a lease be made of any such thing for life or years, with a remainder over in fee simple, fee tail, or for life; it is good, albeit the same be done by word without any deed in writing (1).

Such things as are said to lie in grant and not in livery, generally cannot be granted or given, had or taken, without deed; unless it be in some special cases (2). And therefore rents and services, and such like things which are in gross, and not incident to some other things, may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. And if there be Lord and tenant of arable land by fealty, and the service of yielding the tenth sheaf of corn before it be sowed; the Lord cannot grant this service for \* years without deed. But if a rent, or any service be parcel of, or incident to, a manor, or any other thing which is grantable without deed; in this case, by the grant of the principal by word, this thing may pass, as belonging thereunto without any deed. Also rents or services may be granted upon a partition by one coparcener to another without deed (3).

A reversion cannot be granted in fee simple, fee tail, for life, or years, without deed; unless it be in case where it is

(1) Before the statute 29 Car. 2. c. 3. for prevention of frauds and perjuries.—That statute has been often referred to, in the notes to this edition: and as that act passed since the third edition of the *Tenchstone* (in 1651.) the student will therefore consider the alteration made by that statute in the several parts of the *Tenchstone*, which treat of leases (exceeding the term of three years) grants, &c. being made by parol and without deed in writing, if the act is not particularly mentioned.

(2) Because of things which lie in grant, no possession can be delivered; and they are not like corporeal inheritances which pass by livery; and therefore he that claims them must shew a grant of them, which he cannot do without deed.

(3) Accordingly, *Co. Lit.* 169.

parcel

15 H. 7.  
16 H. 7.  
19 H. 8.  
21 H. 6.

All this v.  
agreed 30  
El. B. R.

Mich. 8 J.  
Dr. Long  
worth's  
case.

21 Ed. 3.  
11 H. 4.  
Dier 29.  
Co. 1. 1.

Plow. 15  
9 Ed. 4.

Perk. Sec.  
61.

15 H. 7.

6 H. 7.  
Dier 1.  
Doct. &  
Stud. 16

(1) 2  
(2) S  
334, 33  
Com. D.



parcel of a manor (1). But a reversion may be granted upon a partition by one coparcener to another without any deed. And the same law is of a remainder. And therefore if one make a lease for life or years to one, the remainder in fee simple, fee tail, or for life, to another without deed, howsoever this be a good remainder in the first creation without deed, yet this remainder cannot be granted over without deed.

15 H. 7. 8. A parsonage or rectory, albeit it consist of nothing but tithes, Advowson,  
16 H. 7. 3. and the like, besides the church and church-yard, and it hath no Tithes, &c.  
19 H. 8. 12. house nor glebe belonging to it, yet may be granted without deed  
21 H. 6. 43. in fee simple, for life, or years: and then the tithes and offerings

will pass as incident. But the tithes alone, or a portion of tithes, oblations, mortuaries, or obventions, are not grantable by themselves without deed. And therefore a lease parol of tithes, albeit it be but for years, is not good. And if the Parson agree with one of his parishioners, that he shall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or used so; but perhaps by way of agreement a parishioner may retain his tithes. And if a lessee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron *Denham*, 2 *Car.* at *Sarum* assises. And yet it is held that a Parson may grant his tithes from year to year to him that is to pay them without any deed, but this is by way of retainer. But this grant or agreement must be made to and with the party himself that is to pay the tithe, and not with another: neither can this interest be assigned, or a stranger take advantage of it, as hath been agreed in the case of *Hawkes* and *Brasfield*, *Pasch.* 3 *Jac.* B. R.

An advowson in gross cannot be granted without deed; yea the grantee of the grantee of an advowson is to shew both the deeds. But an advowson is grantable upon a partition between coparceners without deed. And an advowson incident to a manor, or piece of land, is grantable with the manor or land without any deed. The next avoidance to a church is not grantable without deed (2).

Common of pasture, of estovers, turbary, fishing, &c. cannot be granted in fee simple, fee tail, for life, or years, unless it be in pasture, &c. case of partition, or of appendancy as incident to some corporeal thing, \* without deed. And therefore if a man grant by word of mouth to me common for twenty beasts in his manor; this is not good. Neither if it be granted to me by deed, may I grant this over to another without deed. But if a man have common of pasture appendant or appurtenant to his land; in this case he may grant his land with the common appendant by word only without any deed. Franchises, as fairs, markets, courts, warrens, and the like, or the profits thereof, are not grantable without deed. But it seems a hundred is grantable without deed; for that is *liberum tenementum*. The profits of a mill, county, ferry, corody, or the like, are not grantable without deed.

Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and things.

(1) 2 *Roll. Abr.* 62.

(2) See accordingly in *Cro. Eliz.* 163 *Crispe's* case.—*Long* and *Hemming's* case, 1 *Leon* 207. *Co. Lit.* 334, 335. and *Wheffler's* case, 10 *Co.* 63. See more amply how an advowson shall be granted, in *Com. Dig.* Advowson (C. 1.)

*Hamell  
Mason  
472. 698*

titles of entry to any real or personal thing, are not grantable at all, but by way of release to the tenant of the land, &c. by which means it may be extinguished: but this may not be nei her without deed. And therefore if a man take my goods as a trespassor, or I deliver him my goods to keep, and after I will give these goods to him; I cannot do this without deed.

An election, condition, covenant, assent, licence, or liberty, Dier 281, cannot be created and annexed to an estate of inheritance or freehold without deed.

**Offices.**

A privilege to hold land for life without impeachment of waste Co. 9. 9. is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferior offices, as stewardships, bailiwicks, and the like, are; for such officers a Lord of a manor may retain by word without deed.

**Chattels.**

Most chattels real and personal may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his lease for years (1), the wardship of body and land, or the wardship of land that he hath by reason of a tenure by knight's service, or by grant from the King, or grant or sell me the trees standing upon his ground, the corn growing upon his land, his horse, sword, plate, or other household stuff; this is a good grant or gift. But the wardship of the body of an heir only cannot be granted without deed. So a next presentation cannot be granted without deed (2).

**What by the same deed.**

If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the deed to both of them at one time; this is good, and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other.

If one convey land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed; this is as good as if it were by another deed.

**\* P 232.**

By what words of grant.

\* *Dedi & concessi* be the most apt words for all kind of grants; yet it may be by other words, and the grant as good as by those words (3).

**2. In respect**

of the person of the grantor, &c. and the naming of him. And who may be a grantor. And how.

The best way in grants is to grant by words in the present tense as well as in the preterperfect tense. But a grant by words of the preterperfect tense only, as by *Dedi & concessi* only without words of the present tense is good (4).

Touching this part two things are requisite: 1. That the grantor be a person able. 2. That, if the grant be by deed, he be sufficiently described and set forth, either by his proper names or else by some other matter of distinction. Note therefore that whosoever may be a feoffor, may be a grantor. And any, natural, politic, or corporate body, (not prohibited by law,

(1) A lease is not assignable without a writing signed by the parties since the statute 29 Car. 2. *Queer v. Goddard.* 3 Salk. 171.

(2) See according 1 Wood 662. and fully as to a grant of the next presentation. *Com. Dig.* Condition (C. 2.)

(3) The words *dedi* or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will. *Co. Lit.* 301. b.

(4) In many cases the law creates a good grant without express words; because it is the design of the law to render all contracts binding and effectual. so far as the intention of the parties may be gathered from the deed; and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with, 2 Roll. Abr. 56. *Bac. Abr.* Grants (P.) See further by what words grants may be made, or what may be said to amount to a grant; in *Vin. Abr.* Grants (H. 7.)

Perk. Sect.  
16. See c  
2. Numb

Co. super  
Lit. 3.  
Perk. Sect.  
8. 20. 41  
See ch. 2  
Numb. 6

9 H. 7. 2  
26 H. 8.  
Perk Sect.  
12, 13, 1  
19.  
7 H. 4. 3  
See cha.  
Numb. 6

(1) A  
convenie  
the King  
issue whi  
benefit o  
it; & le  
to the cr  
capacity  
Abr. Ali  
(2) P  
provided  
with reip  
grants n  
(B. 1.)  
Abr. Att  
(3) T  
copyhold  
lege and  
133. a.  
(4) A  
Grants

as Monk, Friar, woman covert, infant, and such like) may be a grantor, donor, &c. And the grants of such persons will be good.

An alien may, and is able to grant or give any thing that he is Alien. capable to have or take by grant or gift (1).

Perk. Sect. 26. See ch. 2. Numb. 6. A person attainted of treason or felony may give or grant his land; and this is good against all others besides the King, and the Lord of whom his land is held. And he may grant or give his goods to relieve himself in prison; and this will be good against all others, and the King and Lord also. A person outlawed in a personal action may give or grant his goods or chattels; and the gift or grant will be good against all others but the King (2).

Co. super Lit. 3. Perk. Sect. 8. 20. 41. See ch. 2. Numb. 6. The Queen may without the agreement of the King make grants, gifts, &c. of her lands or goods (3): but another woman that hath a husband cannot give or grant her lands or goods without her husband's consent, unless it be in some special cases. And albeit she do recite by the deed that she is sole and not covert, yet this will not help. And if the case be so, that by agreement between her and her husband, there be a certain portion of her husband's lands or goods allotted unto her to dispose of, and manage at her pleasure, yet she alone without her husband can make no good grant or gift of any part of these lands or goods. But if she grant any thing by fine, and the husband do not avoid it during the coverture; this grant will bind her after his death. And if she make a gift or grant of her husband's goods, it is thought this is not good until her husband agree to it (4).

9 H. 7. 24. 26 H. 8. 2. Perk. Sect. 12, 13, 14, 19. 7 H. 4. 5. See ch. 2. Numb. 6. An infant cannot make any gift or grant, &c. that is good, but in special cases; for if he maketh any grant or gift that taketh effect by the delivery of the deed only, as if he grant a rent charge out of his land, or make a feoffment with a letter of attorney to give livery of seisin, or give or sell his horse, and the buyer or donee take him himself; these are void *ab initio*. And if the grant, or gift take effect by the delivery of his own hand, as if he \* make \* a feoffment and give livery of seisin himself, or sell a horse and deliver him with his own hands; this is voidable by the infant himself, or others that shall have his right, &c. But if an infant grant

*If he be married as a married woman it is void in the face of it.*

(1) An alien may purchase any thing, but can hold nothing except a lease for years, of a house for convenience of merchandize; all other purchases (when found by inquest of office) being forfeited to the King. He is not capable of inheriting or transmitting by descent; but if he be made denizen, the issue which he hath afterwards shall be heir to him, *Co. Lit. 2. 8.*—The law will not give an alien the benefit of taking by act of law; as by descent, curtesy, dower, or guardianship, because he cannot keep it; & *lex nihil facit frustra. per Hale ch. B. 1 Vent. 417.*—Alienation to an alien is a cause of forfeiture to the crown of the lands so alienated. 2 *Bl. Com. 274.* See more fully, as to the law respecting the capacity of an alien to acquire or convey property, in the notes to the 13th Edit. *Co. Lit. 2. 8. 42. Vin. Abr. Alien (A.) Com. Dig. Alien (C).*

(2) Persons attainted of treason or felony are incapable of conveying, after the offences committed, provided attainder follows. *Co. Lit. 42.*—see more amply as to the consequences of attainder or outlawry, with respect to the forfeiture of the lands of persons attainted or outlawed, and how far and in what cases grants made by them are effectual, *Bac. Abr. Forfeiture (A.) Outlawry (D). Com. Dig. Forfeiture (B. 1.) Utlagary (D.) Bac. Use of the Law 42. 1 Wils. Rep. pt. 2. p. 219. 2 Bl. Com. 290. Vin. Abr. Attainder (B.) Forfeiture (P).*

(3) The Queen consort is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and to do other acts of ownership, without the concurrence of her Lord; a very antient privilege and which no other married woman hath. See 1 *Bl. Com. 218.* 7th edit. and further in *Co. Lit. 133. 2.*

(4) As to grants by feme coverts, see the references in note 2 to p. 54, and more amply in *Bac. Abr. Grants (A. 4.) Baron and Feme (I.) Com. Dig. Baron and Feme (P.) (Q.).*



any thing by fine; this must be avoided during his minority, or else it cannot be avoided at all (1).

**Durefs.**

All grants that are made by durefs, are voidable by the parties themselves that make it or others that have their estates, &c. But if it be done by fine, it is good and unavoidable.

**Non sane memoria.**

All gifts, grants, &c. made by deed in the country by those that are non sane memoria are good against themselves, but voidable by those that are their heirs, executors, or have their estate. But if it be by fine it is good and unavoidable.

A man that is born dumb, or dumb and deaf, if he have understanding may by delivery of the deed and making of signs make a good grant, gift, &c. But a man that is born deaf, dumb and blind cannot (2).

**Bastard.**

A bastard may give or grant as well as any other man, after he hath gotten a name by reputation.

**Parson.**

A Parson may grant any thing belonging to his parsonage for no longer time than for his own life, and therein likewise but during his residency, albeit he have the consent of the patron and ordinary.

**Corporation.**

Neither the head without the members of a corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the lands belonging to their corporation.

**Executors.**

One executor or administrator may give or sell any of the goods of the deceased; and this is good to bind all the rest (3).

What grants ecclesiastical persons may make of their ecclesiastical lands; husbands of the lands of their wives; and tenants in tail of their lands intailed; See in *lease*.

**Misnaming.**

The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain: and therefore howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation by the true name whereby the corporation is made, yet mistakes in this case unless they be very gross, will not make void the grant. *Nihil facit error nominis cum de corpore constat.* And therefore if one that is a bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common esteem than his own right name, or is usually called by another name than his true name in the place where he lives, in these cases they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; some have said he may grant by

*Quay v Quay 5 Brown PC 570 (Bumford v Jones 1 Brown 100*

(1) See before note 1. to p. 7 and note 2. p. 54. and further with respect to the grants of infants, in the case of *Zouch v. Parsons*, 3 Burr 1794. The first general question in that case was, whether the conveyance was good and bound the infant; respecting that question the Ch. J. elegantly says, miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessities, education, employment and many advantages, if they could do no binding acts. Great inconveniences must arise to others, if they were bound by no act. The law therefore, at the same time that it protects their imbecillity and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and without prejudice to themselves, for the benefit of others. The court in that case held, that the conveyance, which was by lease and release, bound the infant.

(2) See fully in the references in the notes before; and in *Bac. Abr. Grants* (A 5).

(3) If a man appoints several executors, they are esteemed in law but as one person, representing the testator; and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release, of the testator's goods, are deemed the acts of all; for they have a joint and entire authority over the whole. *Godolph. Orp. Leg. 134. 1 Roll. Abr. 924. Went. Off. of Ex. 95.* See further post in the chapter on Testaments.

*Sugden v. Sanders 6 Ad. 318. Mann. field's case. Sanders on this case says it is no authority unless the wife was an infant.*

Perk. Sect.  
39.  
Co. super  
Lit. 3.  
Pliz. grant  
67.  
Perk. Sect.  
42.

Perk. Sect.  
42.

3 H. 6. 26.  
Perk. Sect.  
38. 42.

Co. 6. 65. 10.  
112. 11. 11.  
Dier 150.  
Co. 10. 12.

Co. Super  
Lit. 2. 3.  
Perk. Sect.  
43.  
See in foot  
ment cap  
Numb. 4.

(1) The  
omission of

Perk. Sect.

39.

Co. super

Lit. 3.

Fitz. grant

67.

Perk. Sect.

42.

Perk. Sect.

40.

H. 6. 26.

Perk. Sect.

38. 42.

Co. 6. 65. 10.

112. 11. 19.

Dier. 150.

Co. 10. 124.

Co. super

Lit. 2. 3.

Perk. Sect.

43.

See in feoff.

ment cap. 9.

Numb. 4.

either \* of these names. *Sed Quere.* And if *John* at *Stile* grant \* by the name of *William* at *Stile*, this grant is good. *Et sic de similibus.* And these grants are good especially, when there is some other addition to make it more certain; as when a Duke, Marquess, Earl, or Bishop grant by their names of honour or dignity, and grant without any name, or with a false name of baptism; as when the Duke of *Suffolk* by the name of the Duke of *Suffolk* without any more words, or by the name of *William* Duke of *Suffolk*, when his name is *John*, or the Bishop of *Norwich* grant so; these are good grants, because there is but one such Duke, and one such Bishop, within the kingdom. So if a Dean and Chapter, Mayor and Community grant by the name of their corporation without any addition of christian or surname; it is good. And especially then also are these grants good, when the true name doth appear in some other part of the deed. As when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the same deed doth grant by the name of *Thomas* at *Stile*. Or *Alice* at *Stile* reciting by her deed that she is a feme covert, when in truth she is sole. But if an ordinary man grant by his surname only without any name of baptism, or by his name of baptism without any surname at all; in these and such like cases, for the most part the grant will be void for uncertainty; unless there be some other matter in the deed to help it, or some matter done *ex post facto* to supply it: for in some cases where the thing granted doth lie in livery, such a mistake or uncertainty in the grant may be holpen by the livery of seisin upon the deed afterwards. And so also it is in the names of corporations; for if the variance and mistake by omission or alteration be only in some small matter, so as it is literal and verbal only, the grant will not be hurt by it. But if the mistake or omission be in the substance of the name; the grant may be void by it. And therefore if *Decanus & capitulum ecclesie cathed. sancte & individ. Trin. Caerlil.* grant by the name of *Decanus ecclesie cathed. sancte Trin. in Caerlil.* & totum capitulum ecclesie predict: this is good: *Et sic de similibus:* for if the sense doth still remain either expressly, or by necessary implication; and the description be such, as doth import a sufficient and certain demonstration of the true name of the corporation according to the foundation thereof, it sufficeth. But if any of the substance or essence of the name be omitted, *contra.* And therefore if a corporation incorporate by the name of *Prepositi & collegii regalis coll. beate Mariæ de Eaton juxta Windsor* grant by the name of *Prep. & sociorum Colleg. regalis de Eaton, &c.* leaving out *Collegium et beate Mariæ*; this grant is void (1).

Touching this part three things are requisite. 1. That the grantee be a person capable, *i. e.* that he be a person in being at the time of the grant made, and not disabled by any legal impediment to take by the grant. 2. That if the grant be by deed, the grantee be sufficiently named, or at the least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth. 3. That he himself, and not a stranger, do take by the same grant. Note therefore, that all natural and politic or corporate bodies that are not disabled by law may be

P. 234.

*sociorum?*

\* P. 235.

3. In respect of the grantee and the naming of him And who may be a grantee, &c. And how.

(1) The words "*beate Mariæ*" are not mentioned in 10 Co. 124. to have been omitted; but the omission of those words, as well as of the word "*collegium*" is mentioned in Dier. 150.

grantees.

grantees. And all persons that may be grantors may be grantees : and some others that cannot grant or give yet may take or receive. And a grant made to one, two, three, or twenty such persons is good. A grant of land, or rent in possession, to the right heirs of *I. S.* *I. S.* being then living, is void ; for there neither is, nor can be, any such person *in rerum natura* ; for no man can be an heir to another that is living. But such a grant to one in remainder is good, if so be that *I. S.* die before the particular estate end, and before the remainder happen. So if a grant be to him or her that shall be the first child of *I. S.* and he have no child at the time of the grant, this is void. So if a grant be made to the wife or child of *I. S.* when there is none such, it is void. As if a grant be to *I. S.* and to his first born son, or to *I. S.* and her that shall be his wife, and he hath at the time of the grant neither wife nor son ; in these cases, the grant is void as to the wife and son, and *I. S.* shall have all by the grant (1).

**Alien.** An alien may be a grantee ; but if any thing be granted unto him whereof he is incapable, as any estate of lands in fee simple for life, or years, he cannot hold it, but the king will have it from him.

**Prerogative.** A person attainted of treason or felony, before or after attainder may be a grantee ; but he cannot hold the thing granted ; for if the King or Lord will, he may have it from him. So also persons outlawed in personal actions may be grantees of lands, or goods ; but the King will have the profits of the lands and property of the goods.

**Woman covert.** A woman covert may be a grantee ; but her husband may by his disagreement avoid the grant. And yet if he do not avoid it in his life time, the grant will be good : and he that will have the grant to be void, must shew that the husband did disagree to it.

**Infant.** An infant may be a grantee, for this is presumed to be for his advantage. And yet at his full age he may agree to it or avoid it, perfect it, or disagree to it, and without any cause shewed.

**Men non sane memoria.** A man *non sane memoria* may be a grantee as well as any other man, and it seems these grants cannot be afterwards avoided. But such men may not be grantees of offices of trust and such like things.

**Bastard.** A bastard, persons deformed having human shape, lepers, and such like, may be grantees of lands or goods, &c. as other men may be (2).

**Hermaphrodite.** An hermaphrodite may be a grantee according to the most prevailing sex.

\* P. 236. \* A clerk convicted, and a man imprisoned, may be a grantee as well as any other. And so also may a villain of the King or of a common person ; but he cannot retain the thing granted, for the King or Lord may have it from him if he will. But

(1) By the stat. 10. and 11th. *William 3. c. 16.* posthumous children are enabled to take in remainder in the same manner as if they had been born in their father's life time ; although there happen to be no issue born children, until they are born, or come in esse, to receive the same. See further how far the law regards and takes notice of infants *in ventre sa mere*, 1 *Bl. Com.* (7 Edit.) 130. 2 vol. 169. *Bastard (P.)* *Com. Dig.* *Infancy (C.)*—*Fearne on cont. rem.* 3d. Edit. 235.

(2) See further in what cases bastards shall take by grant or devise in *Vin Abr.* *Bastard (P.)* *Com. Dig.* *Bastard (E.)* 1 *Burn's Ecc. Law.* 120. 3d. Edit.

Co. super  
Lit. 3.

1] Bro.  
Noime 9.  
2] Bro. Con-  
firmation  
30  
c] Co. 6. 65.  
27 E. 3. 85.  
c] Co. super  
Lit. 3.  
e] Dier 119.  
f] Co. super  
Lit. 3.

9 E. 4. 43.  
Fitz. Grant.  
23.  
Co. super  
Lit. 3  
Perk. Sect.  
54.  
Bro. Grant.  
65.  
Done 17.  
Dier 337.  
Perk. Sect.  
55. 56.  
Bro Don. 31.  
Grant 172.  
Done 50.  
Fitz. Dones.  
Perk. Sect.  
55. 52.

(1) Papist  
disabled to p  
were declare  
are repealed  
professing the  
" or limitati  
" kingdom  
" kin, being



Monks, Friars, and such like persons, cannot be grantees, for they are utterly disabled (1).

Regularly it is requisite that the grantee be named by his names of baptism and surname, and so it is most safe; and special heed must be taken to the name of baptism, for that a man cannot have two or more names of baptism, as he may of surnames. And yet in some cases, though the name be mistaken, the grant is good.

<sup>a</sup> As if a grant be to *I. S.* and *Em* his wife and her name is *Emelin*, <sup>b</sup> or a grant is made to *Alfred Fitzjames* by the name of *Ethelred Fitzjames*; <sup>c</sup> or a grant be to *Robert Earl of Pembroke* where his name is *Henry*; or to *George Bishop of Norwich* where his name is *John*; <sup>d</sup> or a grant be to a Mayor and communalty, or a Dean and Chapter, and Mayor or Dean is not named by his proper name; <sup>e</sup> or a grant be to *I. S.* wife of *W. S.* where she is sole, all these, and such like grants, are good; for in this case, the rule doth hold *utile per inutile non vitiatur*. <sup>f</sup> And if one be baptized by one name, and after confirmed by another; yet a grant to him by his first name is good. And so also some think of a grant to him by his second name. *Sed Quere* of this. Also when a bastard hath gotten the name by reputation, a grant may be made to him by that name, and it is good.

If a grant be made to *W.* at *Stile*, by the name of *W.* at *Gappe*; this is a good grant, notwithstanding this mistake.

But where a grant doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his christian name or surname; in this case, for the most part, the grant is void, unless there be some special matter to help it, as in the cases before. And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the second son, or to the youngest son, or *seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis I. S.* or *omnibus exitibus I. S.* or to the right heirs of *I. S.* or to the next of blood of *I. S.* in these cases, grants made to these persons, in these words, are good; for the person is certainly enough described. And if a lease be made to *I. S.* for life, the remainder to him that shall come first to Paul's such a day, or to him that *I. S.* shall name in three days; if, in these cases, any one doth come to Paul's that day, or be named by *I. S.* within three days; and the particular estate doth so long continue; this is a good grant of the remainder. *Id certum est quod certum reddi potest*. But if a grant be made \* in these words, \* *P. 237.*

*viz.* To four of the parishioners of *Dale*; or *Deo & ecclesie de D.*; or to two of the sons of *I. S.* and he hath many sons; or to *I. S.* or *W. S.* in the disjunctive; these, and such like grants as these,

Misnaming  
or not nam-  
ing.

Uncertainty.

*Devise to A. rem<sup>r</sup>  
to his second son  
the second in birth  
will take  
Driven v. Fleghe  
2 M. & Selw. 25*

*Quere. Devise to A.  
rem<sup>r</sup> to two of his  
sons when he hath none  
among the two oldest?*

(1) Papists, and persons professing the popish religion, were by stat. 11 and 12th. *William 3. c. 4. §. 4.* disabled to purchase lands, rents or hereditaments; and all estates made to their use or in trust for them were declared void—By the stat of 18 *Geo. 3. c. 60.* several parts of the stat. of 11 and 12 *Will. 3.* are repealed, and particularly so much thereof “as disables persons educated in the popish religion, or professing the same, under “the circumstances therein mentioned, to inherit or take by descent, devise “or limitation, in possession, reversion or remainder, any lands, tenements, or hereditaments, within the “kingdom of England, dominion of *Wales*, and town of *Berwick upon Tweed*, and gives to the next of “kin, being a protestant, a right to have and enjoy such lands, tenements, and hereditaments.”

are

are utterly void for uncertainty. And if a gift or grant of goods be to the parishioners of *Dale* in these words; it seems this is good; but if a grant or gift of land be made to them by these words, it seems this is void. And so also it is of a grant of goods to the churchwardens of a parish; this is held to be good; but otherwise it is of a grant of land to them. A bastard is capable by that name whereby he is usually called; and therefore a grant to him by that name is good (1). And a right heir, or one that shall be the first issue of *J. S.* that hath no child, is capable of a remainder by that name, but of land in possession he is not capable by that name. And a bastard, as the reputed son of *I. S.* may take by a grant to *I. S.* and his issue. A Bishop may take by the name of a Bishop without any other name. But if a grant be made to the parishioners or inhabitants of *Dale*, or *probis hominibus de Dale*, or to the commoners of such a waste, or to the Lord and his tenants bond and free; these are not good grants; for albeit these persons are capable, yet are they not capable by these names.

If there be two grantees, and one of them doth take by the deed, it is sufficient; but if the grant be to one that is no party to the deed, and not to the grantee himself; in this case, albeit the grantee and he to whom the grant is made be capable and never so well described by their names, yet is the grant void; for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a lease for term of life, and after the lessor grant to a stranger that the tenant for life shall have the land to him and his heirs; this grant is void. *Et sic de similibus.* And yet it seems in some cases, if one of the grantees be party to the deed, that another grantee that is no party to the deed may take with him. And therefore the case was. *Robert* gave the reversion of lands which *Agnès* his wife did hold for her life to *Stephan de la moor*, *Habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*; in this case it was adjudged, that albeit *Joun* were not named before the *Habendum*, yet that she should take in tail with her husband.

Touching this point these things are requisite. 1. That the thing whereof the grant is made be grantable, and that both in respect of the nature of the thing itself, and also of his estate that doth grant it; for in some cases, albeit the thing for the quality of it be grantable, yet in respect of the estate and property that the owner hath in it, it is not grantable. 2. That if it be by deed, it be sufficiently distinguished and named.

Amongst things that are grantable, some are grantable *de novo* and in their first creation, but not transmissible nor assignable afterwards. And some are grantable at first in their original creation, and assignable over afterwards from man to man *in infinitum*.

All things that may be granted by fine, and whereof a fine may be levied, may be granted over from man to man.

All the things that are before observed to be grantable by or without deed are grantable over from man to man. And there-

(1) But a bastard cannot be heir, for the estate shall escheat to the Lord. *Finch's Law*. 117. The difference between our law and the civil law, respecting bastards being capable of inheriting, is explained in 1 *Bl. Com.* 247.

Perk. Sect.  
103.  
Bro. Grant  
3 H. 6. 20.  
9 H. 6. 12.  
Perk. Sect.  
91. 87. 101  
Fitz. grant  
145.  
Co. super  
Lit. 144.

Stat. 32 H. 8.  
cap. 7.  
Perk. Sect.  
90.

Perk. Sect.  
73. 88. 87.

Perk. Sect.  
103.  
Per two  
Judges a-  
gainst one  
Hil. 16 Jac.  
B. R.

Perk. Sect.  
101.

(1) See r  
a presentatio  
(2) 2 R. 11  
the word he

fore all corporeal and immoveable things that lie in livery, as manors, messuages, cottages, lands, meadows, pastures, woods, and the like, are grantable in fee simple, for life, or years at first, and assignable over again at the pleasure of the grantee. Also trees, and emblements are grantable. And a man may grant the vesture or herbage, *i. e.* the grass of his ground and not the ground itself. And a man that is seised in fee of a house may give or sell the timber, stone, &c. of the house, and the donee or grantee may

Perk. Sect.

103.

Bro. Grant 3.

3 H. 6. 20.

9 H. 6. 12.

Perk. Sect.

91. 87. 101.

Fitz. grant

145.

Co. super

Lit. 144.

take it after the death of the donor. Also all incorporeal things that lie in grant, as rents, services and the like, are grantable over in fee simple, for life, or years, and therefore rents or services reserved upon any estate, and rents granted out of lands, are grantable over *in infinitum*. And if a man have a rent reserved on a particular estate he may grant over parcel of it. But a rent or service suspended cannot be granted. Neither can a man grant a rent issuing out of a rent. If a rent be granted to me I may grant it over to a stranger before I be seised of it; and this grant is good. But an annuity it seems is not grantable over after the first creation of it. And yet if an annuity be granted to *I. S.* and he assigns *pro*

Rent, services.

Stat. 32 H. 8.

cap. 7.

Perk. Sect.

90.

*consilio*; it seems this annuity is grantable over. Advowsons are grantable in fee simple, for life, or years, from man to man *in infinitum*. Also the presentation to a church before the church is void, is grantable; but when the church is void, that turn is not grantable, for it is then in the nature of a thing in action. Also rectories, and tithes, and portions of tithes, and pensions are grantable from man to man *in infinitum* (1).

Advowsons, &amp;c.

Perk. Sect.

73. 88. 87.

Reversions and remainders are grantable from man to man in fee simple, fee tail, for life or years. And if I have a tenancy for life of three houses; I may grant the reversion of two of them.

Reversions and remainders.

And if I have the reversion of three houses and four acres of land; I may grant the reversion of two houses and of two acres of land. And if tenant in tail be of an acre of land the remainder to his right heirs, he may grant over this remainder by itself; and yet it is such a thing as the tenant in tail himself may bar by a common recovery. But if a grant be of land to *I. S.* for years, the remainder to the right heirs of *I. D.* and *L. D.* is living; this remainder is not grantable so long as *I. D.* doth live. Commons, of pasture, of turbary, of fishing, of estovers, are grantable in

Perk. Sect.

103.

Per two

Judges a-

gainst one

Hill. 16 Jac.

B. R.

fee, for life, or years, from man to man *in infinitum*. And yet if a common in gross and without number be granted to a man and his heirs; it seems this is not grantable over to another man (2). \* But if common for a certain number of beasts be so granted, it seems the law is otherwise, and that this is grantable over in case where the first grant is to the grantee only, and not the grantee and his assigns.

\* P. 239.

Perk. Sect.

101.

Offices are grantable at first; but the great judicial offices of the kingdom, as the offices of the Lord keeper, Chief Justices, or Chief Baron, or of other of the Justices or Barons, and such like, are not grantable over to others, neither may they be executed by deputies. But the sheriffs office, albeit it be not grantable over,

Offices.

(1) See more amply in *Vin. Abr.* Grant F, and therein particularly as to the grant of an annuity, or of a presentation.

(2) 2 *Roll. Abr.* 45. *contra.* a common without number in fee is grantable to another, 18 *E.* 4. 84. for the word heirs implies assigns.



Prerogative.

yet may it be executed by deputy (1). The reversion of an office is not grantable by a subject as it is by the King, yet a subject may grant an office *Habendum* after the death of the present officer; and this is good. The inferior offices also that are offices of trust, especially if they concern the person of the grantor, howsoever they are grantable at first, yet are they not grantable over by the officer to any other, unless they be granted to them and their assigns, and of this sort are the offices of steward, bailiff, receiver, sewer, chamberlain, carver, and the like; neither may these be executed by deputy but where the grant is so (2).

Licences, authorities, &c.

Licences, and authorities, are grantable at first for the lives of the parties or for years. But the grantees of them cannot assign them over. And therefore if power be given to me to make an award or livery of seisin; I may not grant over this power to another. And if licence be granted me to walk in another man's garden, or to go through another man's ground; I may not give or grant this to another.

Possibilities.

A bare possibility of an interest which is incertain is not grantable. And therefore if one have a term of years in land, and by his will devise it to *I. S.* for his life, and afterwards to me for the residue of the years; or devise it to *I. S.* if he live so long as the term shall last, and if he die before the term end, the remainder to me; in these cases, so long as *I. S.* doth live, I cannot grant over this possibility. So if a lease be made to me and my wife for life, the remainder to the survivor of us; I may not grant this remainder over to another man. But such a possibility being coupled with some present interest is grantable over. And therefore if *A.* have four houses in execution upon a statute, and by course of time it will endure thirteen years, and after two of the houses are evicted by *elegit* for fifteen years; in this case he that hath this execution upon the statute may assign over his interest in these two houses, for after the execution by the *elegit* is satisfied, *A.* shall have the two houses again until he be satisfied. The Lord cannot grant the wardship of the heir of his tenant whilst the tenant is living (3).

\* P. 240. Incidents.

Those things that are inseparably incident to others, are not grantable without the thing to which they are so incident and belonging. And therefore a court Baron, which is evermore incident to a manor, is not grantable without the manor itself: common appendant to land, is not grantable without the land itself to which it doth belong: and common of estovers appendant

(1) Wherever one office is incident to another, such incident office is grantable by him who hath the principal office, and therefore it is held that the king's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff, 4 Co. 33.—In like manner, the office of chamberlain of the King's Bench is inseparably incident to the office of marshal; and therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. *Per Holt C. J. 2 Salk. 439.*

(2) See accordingly *Br. Abr. Deputy, pl. 9.*—Office of filazer is not grantable or assignable over because 'tis an office of trust. *Vin. Abr. Grants (H. 1.) pl. 4.*—See more amply who may assign his office. *Com. Dig. Office (C.)*—by whom offices shall be granted. *Vin. Abr. Offices (A.)*—as to the grants of offices by ecclesiastical persons, see *Bac. Abr. Offices (D.)* and 1 *Burr. 219.* the case of *Sir John Yelverton v. Bishop of Winchester*, where the court were unanimously of opinion, that an office and fee, which existed before the first of *Eliz.* is not within the statute of (1 *Eliz. c. 19.*) but may be granted *just*, precisely in the same manner, in which it was granted before.

(3) See more amply as to the grant of a possibility *Vin. Abr. Grant (N.) Possibility (B.) Bar. Abr. Grants (D. 3.)*

16 H. 7. 4.  
Co. super  
Lit. 214.  
Bro. Grant  
173.  
Perk. Sect.  
88, 89.

12 E. 7. 25.  
13 H. 7. 13.

Co. 4. 66.  
5. 24.  
Dier 244.  
Co. 10. 51.

Co. 5. 24.  
10. 48.  
Co. super  
Lit. 214.  
Dier 244.  
Perk. Sect.  
86, 87, 85.  
Bro. Done  
27. 24. 28.  
Co. 6. 50.

Perk. Sect.  
90.

1 E. 4. 10.  
Perk. Sect.  
104.  
5 H. 7. 7.

See condition.  
Co. super  
232.  
Perk. Sect.  
86.  
Dier 283.

Perk. Sect.  
92.  
Fitz. Done  
3. 7.

Perk. Sect.  
99.  
Plow. 379.

(1) If the  
by prescription  
See further  
incidents, an  
purations,  
(2) As to  
Assignment

to a house, is not grantable without the house itself to which it doth belong.

16 H. 7. 4. A rent, service, or other thing, whilst it is wholly in suspense, <sup>Suspended</sup> is not grantable. And therefore if the Lord disseise the tenant <sup>things.</sup> or the tenant infeoff the Lord upon condition; the Lord cannot grant over the feignory during this suspension. But if one have a rent in fee out of my land, and he purchase the same land for life or years; in this case, it seems the rent is grantable even whilst the estate of the land doth continue. So if the tenant make a lease for years or life of the tenancy to the Lord; in this case, the Lord may grant the feignory notwithstanding. And yet if the tenant make a lease to another man for life, and the Lord grant the feignory to this tenant for life in fee; in this case, it seems the grantee of the feignory cannot grant it over, because it was never *in esse*.

Franchises, as views of frank pledge, perquisites of courts, <sup>Franchises.</sup> leets, conuifance of pleas, fairs, markets, goods of felons, waifs, estrays, hundreds, ferries, or passages, warrens, and the like, are grantable over from man to man, in fee, for life, or years, *in infinitum* (1).

Things in action, and things of that nature, as causes of suit, <sup>Things in</sup> rights and titles of entry are not grantable over to strangers but <sup>action.</sup> in special cases. And therefore if a man have disseised me of my land or taken away my goods; I may not grant over this land, or these goods, until I have seisin of them again. Neither can I grant the suit which the law doth give to me for my relief in these cases to another man. So if I make a feoffment to another man, on condition that if I do such a thing, I shall have the land again; in this case I may not before or after the time of performance of the condition grant over the condition to another. But all these things I may release to the parties themselves, for it is a maxim in law, that every right, title or interest in *presenti* or in *futuro*, by the joint act of all them that may claim any such right, title or interest, may be barred or extinguished. And in some cases a grantee of a reversion may take advantage of a condition annexed to an estate for life or years. If a man owe me money on an obligation, or the like; I cannot grant this debt to another; but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor. A presentation to a church, after the church is become void, is not grantable, for it is in the nature of a thing in action. And if a man take my goods from me, or from another man in whose hands they are, or I buy goods of another man and \* suffer them in his possession, and a stranger \* P. 241. taketh them from him; it seems in these cases, I may give the goods to the trespassor, because the property of them is still in me (2).

Trusts and confidences, which are personal things, for the <sup>Personal</sup> most part are not grantable over to others. And hence it is <sup>things.</sup>

(1) If the King grants liberties to J. S. He cannot grant them over. Nor he who has liberties in grose by prescription, as hundred, &c. cannot grant them over. *Br. Abr. Franchises, pl. 38. cites 6 E 2.*— See further in *Vin. Abr. Franchises (A. 2.)* See more amply as to the nature of franchises and their incidents, and therein more particularly as to the privileges of a county palatine; the cinque ports; and corporations, in *Com. Dig. Franchises.*—2 *Bl. Com. 37. Wood's Inst. 205.*

(2) As to a grant or assignment of choses in action, see before in page 94. note 1. see further *Vin. Abr. Assignment (B) (D.) Grant (G.) Bac. Abr. Grant (D. 1).*

also that offices of trust and confidence are not grantable over but in some special cases where they are granted to a man and his assigns; or where they are granted to a man and his heirs. And Plov. 232. hence it is also that a wardship by reason of a term in socage, which by the law is given to the next of kin, is not grantable over to any other person by the guardian in socage.

Entire things.

Some things are so entire that they cannot be severed by grant. Fitz. Grant. 19. 76. And therefore if a man hold three acres of land of me by twelve pence rent, and I grant the services of the third acre; this is void; and he shall have all or none, for I cannot sever the tenure. But if a man hold land of me by homage, fealty, escuage, and a certain rent; in this case I may grant the rent and keep the feignory.

Villains.

A villain is grantable for life, or years; and if the villain during the estate of the grantee, purchase land in fee, the grantee shall have it for ever as a perquisite albeit he have but an estate for life in the villain himself (1).

Chattles real and personal.

All chattles real and personal, regularly are grantable from man to man *in infinitum*, as leases for years, be they present or future, wardships of tenants in *capite*, or by knight's service, trees, oxen, horses, plate, household-stuff, and the like. Also trees, grass, and corn, growing and standing upon the ground, fruit upon the trees, wool upon the sheeps back, is grantable.

Distress.

If a man sell me ten load of wood in his wood to be taken by his assignment; or sell me three acres of wood towards the north side of the wood; by this grant, in these words, I have such an interest as is grantable over. If I make a lease by deed of a house to another, and therein it is agreed between us, that if the rent be not paid me by such a time I shall enter into the house, and take and sell the goods there as mine own to pay the rent; it seems this is a good grant of the goods, and that I may do according to the agreement. And if one that doth hold land of me, grant to me by deed indented that I shall distrain for my service in all his land, this is a good grant.

Money.

A man may give or grant money, as, if I deliver one money, on condition that if he assure me of such land, he shall have it, otherwise that he shall re-deliver it to me again, in this case, if he make the assurance he shall have the money, if not, I may have an accmpt for it.

Fera natura.

Such things as are *fera natura* as conies, hares, deer, and such like, are not grantable at all (2).

Tithes.

A parson of a church may grant his tithes for years, and yet they are not in him.

Deeds.

A man may give or grant his deeds, *i. e.* the parchment, paper and wax \* to another at his pleasure, and the grantee may keep or cancel them. And therefore if a man have an

(1) Yet the villain may purchase some kind of inheritances in fee simple, which the Lord of the villain cannot have; as a common *seign* number, a corrody, &c.—*Co. Lit.* 117. a.—For the doctrine of villenage see *Co. Lit.* 116. to 141.—Mr. Hargrave's argument in *Semmerjett's case*, and Mr. Estwick's considerations on that case.

(2) A man may be invested with a qualified, but not an absolute property, in creatures that are *fera natura*, 1. either *per industriam*, by reclaiming and making them tame by art, industry, and education; or by so confining them within his own power that they cannot escape, and use their natural liberty; or *propter impotentiam*, on account of the inability of the animals, as when birds build in my trees, or conies breed in my ground: 3. Or *propter privilegium*, where a man has the privilege of hunting, taking, or killing animals in exclusion of other persons.—2 *Bl. Com.* 391.—See further as to the nature of property in animals *fera natura*, and what remedy may be had against persons unlawfully destroying or stealing them, in 1 *Hal. Pleas of the Crown*, 512.—1 *Hawk. Pl. c.* 94. *cap.* 33.—and *Vin. Abr.* *Tit. Fera natura*.



Co. super obligation he may give or grant it away, and so sever the debt and  
Lit. 232. it. So tenant in fee simple may give or grant away the deeds of  
Trin. 38 El. his land; and the executor in the first case, and the heir in the last  
B. R. case, hath no remedy. But a tenant in tail of land cannot give or  
25 H. 8. 5. grant any of the deeds belonging to the land intailed no more than  
1 H. 7. the land itself. One may give or grant apparel, and it is said if one Apparel.  
Dove's case. make apparel for another, and put it upon him to use and wear, this  
1 H. 4. 31. is a gift or grant of the apparel itself.  
Fitz. Barre 179.

If one grant to another all the wool of his sheep for seven years; Wool.  
Perk. Sect. this is a good grant.  
90.

If one being a Parson give to another all the wool he shall have  
Fitz. Grant. for tithes the next year; this is a good grant.  
40.

If one grant to another his horse or his cow in the disjunctive; Incertainty.  
Bro. Done tive; this is a good grant notwithstanding this uncertainty, and  
19. the donee shall have election and by that make the grant  
good (1).

Any estate that a man hath in fee simple, fee tail, for life, or 2. In respect  
years, in any lands, &c. or any rent, or profit apprender out of of the estate,  
the same, is grantable from man to man *in infinitum*. And he property and  
that hath any such estate of any lands may charge it with any rent possession of  
or profit, to be taken out of it, as long as the estate of the land the grantor.  
doth last. But an estate at will is not grantable over. And if an 1 SR. 382  
estate be made to a man and his heirs without the word assigns, Co. Ell. 156  
yet he may assign it at his pleasure, for assigns is included within  
heirs.

25 E. 4. 37. An *Interesse termini*, i. e. a lease for years to commence in *futu-*  
Perk. Sect. ro, is grantable before the term doth begin; whether it be a lease  
91. of the land itself, or any rent or other profit out of it.

Co. 4. 64. The interest or estate, that a man hath by extent, is assignable  
from man to man at pleasure.

Co. 6. S. Geo. The reversion upon an estate tail is grantable; and yet the tenant  
Carlton's case in tail in possession, by the suffering of a common recovery, may  
Co. 1. Al- bar him in reversion of any fruit of it.  
tonwood's  
case.

Co. 1. 147. If an estate be made of land upon condition, as, if *A.* make a  
10. 48. 49. feoffment to *B.* on condition that if *A.* pay twenty pounds he shall  
Lit. chap. have the land again; in this case, *A.* and *B.* together may at  
Confirmation any time before the performance of the condition join together and  
tion. grant this land, or charge it with any rent, &c. and this will be  
good; for it is a maxim in law, fee simple land may be charged  
one way or other. And in this case, *B.* may grant over his estate  
alone; but it will be subject to the condition. And if *B.* grant a  
rent out of the land to a stranger, and after the condition is per-  
formed and the feoffor enter; in this case he shall avoid the rent.  
Co. 1. 147. But in this case *A.* cannot grant; for he hath nothing but a possi-  
bility. If one infeoff divers to the use of his son and heir upon  
condition, and before the time of performance of the condition the  
father and son join to grant or charge the land, this is a good grant  
or charge.

Co. super \* If the tenant in tail, and he that is next in remainder in fee, join \* P. 243.  
Lit. 45. in the grant of a rent charge in fee, and after the tenant in tail  
Co. 10. 48, doth die without issue; in this case this is a good grant and charge  
49.

(1) See accordingly 1 Wood 668. 9. and further what things may be granted, Vin. Abr. Grants (D).  
Com. Dig. Grant (C).

*Hill v. Sandbach  
Loke*

against him in remainder (1). And if *A.* doth bargain and sell land to *B.* by indenture, and before inrolment they do join to grant a rent charge to *C.* by deed; in this case this is a good charge and grant, whether there be any inrolment or not. And so if donor and donee in tail grant a rent charge out of the land, and then the donee die without issue; in this case, the grant is good to bind the donor.

If land be granted to two men and to the heirs of their two bodies begotten; in this case, albeit they have several inheritances after their death, yet neither of them can grant away his estate after his life; for they are divided only in supposition of law.

One coparcener of a feignory may grant his part to a stranger. Perk. Sect. 80.

If two jointenants be of a plow land, and one of them doth grant to a stranger common of pasture for beasts without number, to be taken in the same land; this is void. Perk. Sect. 103.

**Jointenants.** If two jointenants be of a reversion, and one of them grant the whole, this is void for a moiety. If a man grant or charge that which is none of his, and that wherein he hath no property, it being in the grantee, or a stranger; the grant is void. And therefore if a man grant a rent charge out of the manor of *Dale*, or grant a reversion of land, and in truth the grantor hath nothing in the manor of *Dale*, or in the land; in this case the grant is void. And albeit the grantor doth afterward purchase the manor, or the land, yet this will not make the grant good. But if the grant be by fine, or by indenture, there in some cases it shall be good by way of estoppel. And in this case, albeit the party recite that it is his own, yet this will not mend the case. And therefore if a man recite that he hath a rent of ten pounds a year, and then grant five pounds a year parcel of it; in this case, if he have no such rent the grant is void. Perk. Sect. 80. Perk. Sect. 65. Dier 12. 33.

*Quere if by virtue  
of the doctrine of  
relation a person  
may grant the same  
good to him before  
induction.*

Estoppel.

**Servant.** A shepherd, bailiff, or parker, cannot give or grant away the goods of his master without authority. And yet it seems the servant of a taverner or mercer may give or grant his masters wine or wares (2). And if a wife give or grant the goods of her husband; this is a good gift or grant until the husband disagree to it, and by his agreement it is made good for ever. Bro. Done 56. 4.

**Husband  
and Wife.**

If a man have a lease for years of land, and make a lease for life of it, or charge it for longer time than the lease for years doth last; in this case, the grant is good for so long as the lease for years doth last and no longer. But if he make a lease for life and give livery of seisin, he doth forfeit his estate. Plow. 514. 525.

Regularly a man cannot grant or charge that which is not in his own possession, albeit, he have a right to it: and therefore if a man be disseised of his land, and before he hath entred into or recovered the land, he doth grant or give the land, or his right to the land, to a stranger, or grant a rent charge out

\* P. 244.

(1) When tenant in tail makes a grant of the thing itself intailed, this grant is not void by his death, for that the same may be made good, it being only voidable; otherwise 'tis of a thing granted out of an entailed thing, as of a rent granted out of land intailed, this grant is void by the death of the grantor tenant in tail, and the same can never be made good after—*Arg. 1 Bulf. 32. Walter v. Boul.*

(2) See accordingly *Vin. Abr. Grants (H. 9.) pl. 4.*

Perk. S.  
92. 93.  
Co. Jus.  
Lit. 46.

Hil. 18.  
B. R. p.  
2 Justic

Perk. S.  
92. 93.  
Fitz. D.  
3 Bro.  
Done 13.  
Dier 9.  
Co. 4. 62.  
Dier 30.  
20 H. 6.  
Perk. S.  
59.  
Co. 11.

Dier 35.  
15 H. 7.

(1) And  
fore severa  
So every or  
of the corn  
See fully a  
(Biens G.)  
on testamen

of the land to a stranger; in these cases, the grants are not good. And yet such grants by fine may be good by way of estoppel. And by a release also the right may be extinct. But if one hath a re-

Perk. Sect.  
92. 98.  
Co. Super  
Lit. 46.

version upon an estate for life, and he grant a rent issuing out of this land; in this case the grant is good, and the charge shall fasten upon the land after the estate of the tenant for life is ended. And if a man grant common, or rent, notwithstanding that a stranger take the rent or use the common at the time of the grant, yet this grant is good; for a man cannot be out of possession of

*the grantee of a reversion may distinguish from the rent accruing in the life estate when the reversion falls into possession.*

Hil. 18. Jac.  
B. R. per.  
2 Justices.

these things but at his pleasure. And if a lease for years be made to me, I may grant away my estate before my entry. And if the lease be to begin at a day to come; I may assign over my interest before the day come; for in this case the interest is in me from the time of making of the lease. Also I may give or sell my goods that I have not in possession; and therefore if a man take my goods out of mine or another man's possession, I may afterwards give or grant these goods to him or another man, and this grant or gift is good.

*with my consent?*

Perk. Sect.

92. 93.

Fitz. Done

3 Bro.

Done 13.

Dier 9. 30.

Co. 4. 62. 63.

Dier 305

20 H. 6. 22.

Perk. Sect.

59.

Co. 11. 50.

A lessor cannot give or grant the trees growing on the ground of his lessee for life, or years, without the licence of the lessee; except they be first cut down by the lessee or some other, for then he may.

Tenant for life. Trees.

And if there be lessee for life, and the lessor give the trees growing on the ground, and after the lessee for life dieth; in this case the donee cannot take them; for that at the time of the gift a property of them was in the lessee. But if a tenant in fee simple give or grant the houses standing, or trees growing, on the ground he hath in his possession; in this case, the grantee or donee may take them after the death of the grantor; and that, albeit they be not cut or taken down before his death. And yet if the tenant in tail give or grant the trees growing upon his intailed land, and the donor die before the trees be cut; in this case, the donee or grantee cannot cut them afterwards. Howbeit if such a tenant in tail give or grant his emblements of corn growing on the ground; the donee may cut and take them after the death of the tenant in tail (1). And if the tenant in tail give or grant his trees, and die before they be cut, and afterwards, before the issue in tail enter into the land, the donee or grantee cut them and take them away; in this case, the issue in tail can bring no action of trespass against the donee, or grantee, for the trees: but perhaps, if the trees be not removed off the ground, he may take them.

Tenant in tail. *the trees must be felled to have the cut tail, and tenant in fee simple cannot take the emblements, but he can have the trees.*

Dier 35.  
15 H. 7.

If two coparceners be of an advowson, and the one doth present, and then he doth grant the next presentation; this is on a good grant, but by this grant doth pass the next he hath to grant, for his companion must have the next. So if one be seised in fee of an advowson, and he hath a wife, and he grant the third presentation; this is a good grant, but it shall

Presentati-  
on. \* P. 245.

(1) And where there is no grant of them, if tenant in fee, or in tail, die after sowing the corn, and before severance, his executor or administrator shall have the emblements as the chattles of the testator.—So every one, who has an uncertain interest, if his estate determines by the act of God before severance of the corn, shall have the emblements, or they go to his executor or administrator.—Co. Lit. 55. b.—See fully as to the nature of emblements, and who shall have them,—1 Bl. Com. 122. 403.—Conn. Dig. (Biens G.)—Vis. Abr. Emblements—(A.) 3 Atk. 16.—and as to a devise of them post, in the chapter on testaments. Powell on Mortgages § 141. 73.



3. In respect of a former grant of the same thing.

be taken for the third he may grant, which is the fourth, for the wife is to have the third for her dower (1).

If a man have granted a thing once, he cannot afterwards grant it again (2). And therefore if a man give or grant me a horse first by word of mouth, and after grant him to me by deed; this second grant is void; and therefore, if there be any fault in this grant in writing, it is not material. And if a man grant to me common of pasture without number in his ground, and after make the like grant to another; this second grant is void as to me, albeit it be good against the grantor. And if one grant the next presentation to a church after the death of the present incumbent, and after grant the same to another: or make a lease of land to one for ten years, and after make a lease of the same land to another for the same ten years; or give a horse to one, and after give the same horse to another; in all these cases, the second grant is void. But if the first grant or gift be only of part of the thing granted afterwards, or of part of the time only, the second grant will be good for the overplus. And therefore if one be seised of a manor, and demise ten acres of the demesne to one for ten years, and after demise the whole manor to another for twenty years; this is a good grant for the overplus of the manor besides the ten acres, presently; and for the whole manor, for the last ten years. So if the second grant be to begin after the first is determined; it is good. And if the second be such as may be satisfied and not impeach the former, both shall stand good. And therefore if one that hath an advowson, grant the next presentation to one, and after he doth grant the next presentation to another, and doth not say [after the death of the incumbent;] in this case the second grant is good, and the grantee thereby shall have the second avoidance after the death of the present incumbent (3).

4. In respect of the naming or description of the thing granted. Misnaming or Misrecital.

By the grant of an acre of land or of any other thing, by the name whereby it is called, the reversion of that thing, if the grantor have no more but a reversion, will pass, and this mistake will not hurt. But it is not so *e converso*.<sup>a</sup> And yet some have said, if one grant a thing in possession, by the name of the reversion of the thing, this is good to pass the possession. *Quod non est lex.*<sup>b</sup> For if one make a lease for years, and before the lessee enter, the lessor grant the land by the name of the reversion or the land; this grant is void. If one make a lease for life of the demesnes of a manor rendring rent, and after he doth grant the manor by the name of the manor; this is a good grant for the reversion of the demesnes, as well as for the residue of the manor. But if one grant common, by the name of the reversion of the common, it seems this is not good. And yet if one have common and grant it for life, and during that \*estate he doth grant the common by the name of *totam illam Communiam suam, &c.* some do hold this grant to be good.

\* P. 246.

(1) Parceners seised of an advowson may join in a presentation: but if they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue, nay her assignee, shall have it; and so shall her husband who is tenant by the curtesy.—*Co. Lit.* 166. b. 186. b. See more amply in *Com. Dig. Esgliffe* (H. 3.)—*Vin. Abr.* Presentation (G. a.)

(2) A second grant of the same thing to the same person by the same person, and reciting the former grant, must not be pleaded as a grant, but as a confirmation. *Flow. Com.* 397.

(3) *Ut res magis valeat quam pereat*, according to the rule of construction, mentioned in page 84.

Co. 6. 65. Any thing may be granted by the name whereby it is and hath  
 45 E. 3. 6. been, usually called of latter times, within nine or ten years or  
 Bro. Grant 7- thereabouts, albeit it be an improper name, and not the ancient  
 Perk. Sect. name of the thing, but a name newly gotten. And so a manor  
 116. may pass by the name of a messuage or farm, or a farm or manor  
 by the name of a messuage, if it be so usually called and  
 14 H. 8. 1. reputed (1). So the great houses in London called *Exeter* and  
 27 H. 6. 2. *Dorset* houses may be granted by those names. And if a man grant  
 that which in deed is a pasture ground, by the name of a wood;  
 or grant that which in deed is a wood, by the name of a pasture  
 ground; and the things are called by those names; these are good  
 grants of those things. And if one grant by the name of a great  
 field, that which in deed is but a little close, but it is usually called  
 by the name of a great field; this is a good grant of this thing.  
 So if one grant by the name of a plow land, that which in truth  
 is but an acre of land, or grant by the name of a manor, that which  
 is but a plow land; these grants are good. And so it seems it is  
*à converso*. But if a man grant a house, or a messuage; by this  
 grant an acre of land will not pass.

Co. super  
 Lit. 150.  
 Mich. 7 Jac.  
 Curia. B. R.

By the grant of services, a rent reserved upon an estate tail will  
 pass.

If a man make a lease of one house to another for years, and  
 the lessee divide it and make two houses of it, and after the lessor  
 doth grant the reversion of it by the name of one house; this is a  
 good grant to pass it. And if one lease three houses to three se-  
 veral men at several times, and they divide them into twenty nine  
 tenements and households in them all; and the first lessor doth grant  
 them by the name of three messuages: this is a good grant to pass  
 them all. But if he grant by the name of fifteen messuages or te-  
 nements only; it seems this is good for no more but for fifteen of  
 the subdivided tenements (2).

Perk. Sect.  
 72.

If one recite that he hath a rent charge issuing out of black  
 acre and white acre, and then grant the same rent, and in truth it  
 doth issue out of black acre only; or if he do recite that it doth  
 issue out of one acre when in truth it doth issue out of both;  
 in both these cases the grant is good, notwithstanding these mis-  
 takes.

Bro. Grant  
 12.

Perk. Sect.

79.

Per. Ch.

Justice Hut-

ton & Yel-

verton Co.

B. Mic. 3.

Car. in the

case of Ed-

ward Crew.

If one be patron of the church of *S. Peter* and *Paul* in *D.*  
 and he grant the next presentation of the church of *S. Peter*,  
 or of the church of *S. Paul*; these are void grants to pass the  
 presentation.

If one grant a rent out of white acre by the name of a rent out  
 of black acre; this grant is void as to charge white acre.

If one have a manor called *Steeple Lavington*, and he grant  
 it by the name of west *Lavington* alias *Steeple Lavington*, it is  
 a good grant by the [alias] \* especially if the grant say [lying in \* P. 247.

(1) A manor in reputation, but which is not in truth a manor, does not pass by the name of a manor in a Fine or recovery; for they are grounded on original writs, which ought to be certain, and not to be taken by intendment; but otherwise in a grant or feoffment, for there the intent of the parties shall help it. *Noy 7. Johnson v. Heydon.—Br. Abr. Feoffment, pl. 14. see further 1 Lev. 27.*

(2) If a man make a lease of eight tenements in *D.* by several leases, and then by deed recite seven of the leases, and grant the reversion of them to *A.* with all his lands, houses, and edifices in *D.* having no other lands &c. in *D.* than the eight tenements, the reversion of the eighth tenement not recited shall pass; for the other words, all his lands, &c. cannot otherwise be satisfied.—*1. 1. Abr. Hagget v. Giles.*

\* This is overruled. *4d. 3. Bac. Ab. 276. Co. 63. overruled by Coke Chief Just.*

*Lavington]*

*Lawington*] and the manor of *Steeple Lawington* doth lie in that parish, and the grantor hath no other land there.

If one grant all his lands which he hath in *D.* in this manner, [All my lands in *D.* which I had of the grant of *I. S.*;] this is a good grant of all his lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. But if the words be [all my lands which I had by the grant of *I. S.* in *D.*;] in this case the grant is not good to carry any other lands in *D.*, but such as he had of the grant of *I. S.* So if one grant in this manner [all my manor of *Sale*, in *Dale*, which I had by descent] and in truth he had it not by descent but by purchase; this is a good grant of the manor. So if one grant all his lands in *Dale*, and say no more; this is a good grant to pass all his lands there. But if one grant in this manner [all my lands in *Dale* which I had by descent from my father,] and in truth I had them not by descent but by purchase, this grant is void and will not pass those lands. So if I grant in this manner [all my lands that I had by the attainder of *I. S.*] and in truth I had no land by that means; this grant is void. And if I grant after this manner [all my lands in *B.* in the tenure of *D.* which I had of the gift of *I. S.*] and in truth it doth lie in *B.* and is in the tenure of *D.* but it was not purchased of *I. S.* this is a good grant to pass the land.

If a parish lie in two counties, viz. *Berks* and *Wilts*, and one grant in this manner [all his close called *Callis* in the parish of *Hurst* in the county of *Berks*] and in truth the close doth lie in the county of *Wilts*; this is a good grant to pass the close. But if one grant in this manner [all his houses in the parish of *St. Bottolph extra Algate* late in the tenure of *R.*] and in truth he hath no houses there, but he hath some houses in *St. Bottolph extra Aldersgate*; this is a void grant. And yet if the grant be in this manner, [all that my house in the occupation of *I. S.* in *St. Andrew's* parish] whereas in truth it is in the parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus [all that my house in *St. Andrew's* parish in *Holborn* in the occupation of *I. S.*] and in truth it is in another parish, but in his occupation; this grant is not good to pass the house.

If one grant in this manner [my manor of *Dale* which appeareth by office found to be of the value of ten pounds *per annum*] and in truth in the office it is found at twenty pounds *per annum*; this grant is good notwithstanding this misprision.

If one grant in this manner [all my manor of *W.* late parcel of the possession of the Abbot of *S.* and late in the possession of *K.*] and in truth it was never in the possession of *K.* this grant is good notwithstanding. But if the grant be thus [omnia illa terras &c. \* in tenura *I. S.* jacen. in *W.* nuper prioratui de *S.* spectan.] and in truth the land doth lie in *S.* and not in *W.*; this is no good grant to pass the lands in *S.* And if the lands do lie in *W.* but are in the tenure of *I. D.* and not in the tenure of *I. S.* the grant is void to pass the lands in the occupation of *I. S.*

If one purchase land of *I. S.* in *T.* and have no other land there, and he grant his land in *T.* late the land of *R. S.* or late the land of *S.* and mistake or omit the christian name; this

See page 75.

The specific description suffices to show the land being the other mistake

\* P. 248.

Mic. 2 Jac. in Brown's case, agreed.

Plow. 169. 395. And so was the opinion of Ch. Justice Popham 2 Jac. B. R.

Dier 87.

Mic. 2 Jac. Adjudged Brown's case.

Dier 299. Co. 3. 10.

Hil. 2 Jac. B. R. per Tanfield.

Pasc. 7 Jac. B. R. Co. 2. 31.

Dier 376. Bro. Grant 92.

Dier 80.

Bro. Grant 69.

Bro. Grant 53. 7 H. 4.

Co. 1.

Curia C. Pasc. 9 Inter P. & Slec Bro. G 53.

Co. 1



this grant is good, notwithstanding this mistake. And so also it is where there is a blank left for the christian name. And if in this case he grant all his land in *T.* and say no more, this is a good grant to pass the land. And if one grant [all his lands in *D.* called *N.* which were the lands of *I. S.*] this is a good grant to pass the lands called *N.* though they were never the lands of *I. S.* But if the grant be [of all his lands in *D.* which were the lands of *I. S.*] by this none but those lands that were the lands of *I. S.* will pass.

9 Bacon 388.  
5 Taut. 207.  
Doe's and Jersey  
112 f. al. 550.

Dier 80. If one grant in this manner [all my meadow in *D.* containing ten acres] whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres. So if one grant thus [all those forty seven acres of land by the sleight, whereof fifteen lie in *D.* twenty in *E.* and twenty five in *F.*] and in truth all of them do lie in *F.* and none of them in *D.* or *E.* this is a good grant to carry the whole forty seven acres.

Bro. Grant 69. If one grant twenty load of wood, and say in his grant [of which twenty load of wood he had sixteen load by the grant of his father *I. S.*] and in truth *I. S.* did not grant any wood to him at all, or did not grant unto him sixteen load only; this is a good grant of the twenty load of wood, notwithstanding this false recital.

See page 75

Bro. Grant 53. If one grant his manor of *D.* and doth not say in what town or towns it doth lie; this is a good grant. But it is best to say in what towns the manor doth lie; for if it lie in divers places (as it may) and any of the places into which it goeth be omitted, and the rest are set down; no part of the manor lying in the town that is not expressed will pass.

Co. 1. 46. If one grant a manor, and that which in truth is but one manor, by the name of the manor of *A.* and *B.* this is a good grant of the manor. And so also it is if it be two manors, as if a man be seised of the manors of *Ryton* and *Condor* in the county of *Salop.* and he grant in this manner [*totum illud Manerium de Ryton & Condor cum pertinen. in Com. Salopie* :] this is a good grant of both the manors. Otherwise it is in case of the King.

Prerogative.

Curia Co. B. 53. If one have a farm of land, meadow, &c. by lease called *Hodges*, lying within the parishes of *St. Stephen* and *St. Peter* in *St. Alban's*; and he, reciting the said lease, grant to *C.* his term, and interest in the house, lands, &c. called *Hodges* in the parish of *St. Peter* \* and *St. Albans*; this grant is good only for so much as doth lie in the parish of *St. Peter*, and not for that which doth lie in *St. Stephens*. But if he grant the farm, and doth not say in what parish it doth lie; this is a good grant of the whole farm. As in the case before of a manor that doth lie in divers parishes. And if in the case here, the farm lie within the parish of *St. Peter* only; the grant is good for the whole farm. If one recite, that whereas he hath such lands by forfeiture, or whereas such a one hath an estate of his land, or whereas the grantee hath paid him ten pounds or done him such service, or the like, and these things are not true, and afterwards he doth grant the land by apt words; this mistake in these cases will not hurt the grant. But otherwise it is in case of the King, in some of these cases.

\* P. 249.

Prerogative.

Co. 11. 50. If one have a manor in which he hath parks and fishponds, and he grant the manor for life, except the game and fish, and after

after grant the reversion of the manor; this is a good grant of the game and fish also.

If a grant be of [*Centum libratis terræ*, or *50 libratis terræ* or Co. super of *Centum solidat' terræ*] it seems these are good grants, and that <sup>Lit. 5.</sup> hereby doth pass land of that value, and so of more or less.

If a grant be of an acre of land covered with water, this is a Co. super good grant. <sup>Lit. 4.</sup>

If a grant be of a certain portion of land or tithes, or of the <sup>Dier 84.</sup> fourth part of land or tithes, and there be a sufficient certainty in the <sup>34 E. 3.</sup> description of it, this grant is good. And therefore if the grant be of the fourth part of the tithes, and of the offerings of the church of *St. Peter*, this is a good grant.

If one, seised of an advowson in fee, grant to *I. S.* that as oft <sup>Bro. Grant.</sup> as the church is void he shall name the clerk to the grantor, and <sup>101, 121.</sup> he shall present him to the ordinary; this is a good grant of the advowson.

A reversion may be granted by the name of a remainder, or a <sup>Dier 46.</sup> remainder by the name of a reversion, and such a grant is good. <sup>Plow. in</sup> As if one grant land to *I. S.* the reversion to *I. D.* this is a good grant <sup>Hill. & Grange's case.</sup> of the remainder.

<sup>quare.</sup> If one make a lease of land to husband and wife for their lives, <sup>Fitz. Grant.</sup> and after grant the reversion of this by the name of the reversion <sup>63.</sup> of the land which the wife doth hold for life; this grant is void. So if one grant to two for life, and after grant the reversion of one of them, this is void.

A fulling, or grist mill, may be granted by the name of a mill <sup>21 Aff. pl.</sup> only. <sup>23.</sup>

<sup>Incertainly.</sup> If one grant in this manner [all that his messuage, &c. And all <sup>27 H. 6. 1.</sup> the lands, meadows, and pastures, thereunto belonging; this is a <sup>Plow. 164.</sup> good grant, and certain enough to pass all the lands, meadows and <sup>Bro. Lease</sup> pastures usually occupied therewith. <sup>55.</sup>

\* P. 250. \* If the Lord grant his manor by the name of [his manor with <sup>Fitz. Grant.</sup> the reversion of all his tenants] or by the name of [the reversion of all <sup>68.</sup> his tenants bond and free which hold for life or years;] and do not <sup>Perk. Sect.</sup> name them by their particular names; these grants are good in these <sup>68.</sup> cases and certain enough.

If one grant land, and say not in what parish or county or vil- <sup>Bro. Grant.</sup> lage it doth lie; yet if there be any other matter to describe it; it <sup>53.</sup> seems the grant is good enough, and it may be averred where it <sup>Co. 9. 47.</sup> lieth. But if there be no circumstantial matter in the grant to denote and decypher out where it doth lie; it seems the grant is void for incertainty (1). And therefore if one grant his manor of *Dale*; or his lands in the occupation of *I. S.* or his lands that descended to *I. S.* or his lands that did belong to the priory of *S.* or the like; these are good grants and certain enough. *Id certum est quod certum reddi potest.*

If there be tenant for life of three houses, and four acres of <sup>Perk. Sect.</sup> land, and he in reversion grant the reversion of two houses and <sup>73.</sup> two acres of this land; this is a good grant and hath sufficient certainty in it.

If a grant be incertain altogether, and have not sufficient <sup>Perk. Sect.</sup> certainty in it, and cannot be made certain by some matter <sup>ex 67.</sup>

(1) So in like manner where there is any uncertainty in the limitation of the estate, as where *A.* possessed of lands for a term of two thousand years, grants to *B.* and his wife, *without mentioning any term*, to the use of *C.* for his life and to the heirs of his body; and in default of issue to *B.* for one thousand eight hundred years; the first limitation held to be void for uncertainty, it mentioning to grant to *B.* and *ux.* and not saying for what estate or term.—See *Kerby v. Duck*, 2 *Vern.* 684.

*post facto*, it is void. And therefore if there be Lord and tenant of three acres of land by fealty and twelve pence rent, and the Lord grant [the services of the third acre] to a stranger; this grant is

Perk. Sect.  
68, 68.

meerly void. So if husband and wife hold an acre of land jointly of *I. S.* for their lives, and *I. S.* grant the reversion of the acre of land which the husband alone doth hold for his life; this grant is void.

9 H. 6. 12.

So if there be Lord and three joint-tenants, and the Lord grant the services of one of them to a stranger; this grant is void. So if one have twenty tenants that do pay him twelve pence a-piece rent, and he grant five shillings yearly out of these rents, and doth not say

44 E. 3. 17.  
Bro. Grant  
51.

of which tenants, this grant is void for uncertainty. So if conu-  
fance of pleas be granted, and it is not said before whom: this is utterly void. So if one have two tenements, and doth grant the

Dier 91.

reversion of one of them, and doth not say which; this is void for uncertainty. So if one grant estovers to another, and say not

Co. 5. 24.

what nor how; this is void. So if one grant me so many of his trees, or of his horses as may be reasonably spared; this grant is void (1). And yet if one grant me so many of his trees as *I. S.*

shall think fit; it seems this grant is good. And if one grant me one hundred load of wood to be taken by the assignment of the grantor, or to be taken by the assignment of *I. S.* these are good grants. So if one grant me three acres of wood toward the north side of the wood; this is a good grant, and certain enough.

Bro. Done  
31.

If one grant to one of the children of *I. S.* and *I. S.* hath more \* than one, and he doth not describe which he doth intend; \* P. 251.  
this grant is void for uncertainty. *It may be helped by agreement in a devise*

9 E. 4. 36.  
Perk. Sect.  
74.

If one grant to me a rent, or a robe; twenty shillings, or forty shillings; or common of pasture, or rent; in the disjunctive, which

Perk. Sect.  
76.

is at first very uncertain; yet this grant may become good, for if I make my election, or he pay the rent, or perform the grant in either part; the grant is now become good. So if one be seized of

two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *I. S.* in this case, if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man

hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case, I may choose which I will have, and in these cases when I have made my election, and not before, the grant is good. And if in these cases, the

Bro. Grant  
77.

grantee doth not make his election during his life, it seems the grant will never be good. If one be seized of land, and lease it for years rendring ten shillings rent, and after he doth grant a rent

of ten shillings out of this land to a stranger; in this case, albeit there be some uncertainty in the grant, yet this is a good grant of a rent of ten shillings; but it shall be taken a grant of a new and

not of the old rent, and therefore shall not take effect until the particular estate be ended.

See more to this point in *Deeds and their Exposition*, chap. 5. numb. 15. and *Fine*, chap. 2. numb. 7 (2).

*Notes' case*  
*1 Blym. 410*  
*Carle v Carle*  
*19 Nov. Inst. 601.*  
*Li man deciding*  
*to his son, having*  
*two horses and*  
*Wood v Ingersoll*  
*in Term 1822*  
*Co. Sess. 742*  
*— See 374*

(1) For there is no standard to reduce the grant to a certainty, *Hob. 168. Moor 880.*

(2) And further, as to mistakes and misrecital in grants, in respect of names or things,—in *Bac. Abr. Grants (H.)—Vin. Abr. Grants (D.)*



5. In respect of matter in some other parts of the grant.

1. In the commencement of the estate.

*Doc v Polgreen*  
*J. H. Blackstone*  
*535*  
*grant nothing*  
*it would have been*  
*good of a devise*

*Greenwood v Libby*  
*100. Jac. 548*  
*Bullen case*  
*2 Coke 85 a*

Incertainty.

\* P. 252.

*grace*

2. In the limitation of the estate: or in the *Habendum* of the grant.

Incertainty.

6. In respect of the end or ground of the grant.

In some cases, albeit there be in a grant a good grantor, and a good grantee, and a thing granted, and all these are duly and certainly described, yet the grant may be void for some fault in some other thing touching the grant: as, 1. In the commencement of the estate. For if a man be possessed of a term of years, albeit it be one hundred years, or upwards, and grant to another all the residue of this term of years that shall be to come at the time of his death; this grant is void for incertainty. And yet if a man possessed of such a term in land, grant the land to another, to have and to hold to him after the death of the grantor for fifty years, or for two hundred years; these are good grants; and in the first case, the grantee shall have fifty years, if there be so many to come of the term of one hundred years at the death of the grantor; and in the last case, the grantee shall have the land for the whole one hundred years, or so many of them as are to come at the death of the grantor. So if one grant any thing that doth lie in livery or in grant, and that is in *esse* at the time of the grant, in fee simple, fee tail, or for life, and the estate is to begin at a day to come; this for the most part is void: howbeit in some cases the livery of seisin will help it. But a lease for years to begin in *futuro* is good enough. And if a lease be made to one for years, or for years determinable upon lives, \* and after a lease is made to another of the same thing, to have and to hold from the end of the former lease, this is a good lease, and the commencement certain enough. So if a lease be made of land to one for life, and after the reversion thereof is granted to another for life, *cum post mortem vel alio modo vacare contigerit*; this is good. So if a lease be made to one for twenty years if he live so long, and after a lease is made to another *Habendum* after the end of the term granted to the lessee, for twenty years to be accompted from the date of the deed last made, this is a good grant for twenty years after the first lease ended, and the words [to be accompted, &c.] shall be rejected. And if one grant a rent to me, *Habendum* from the time of my full age for my life, and I am of full age at the time of the grant, this grant is good for my life. If a woman sole have a lease for years and take a husband, and then he in reversion grant the land to another, *Habendum* after the term granted to the husband, &c. where in truth it was never granted to the husband but by an act of law, *viz.* the marriage, yet this is a good lease. 2. In the limitation of the estate. For if a grant be to two & *heredibus*, without *suis*, this is void for incertainty. And yet a grant to one & *heredibus*, is good. And if a man grant two acres, to have and to hold the one in fee simple and the other in fee tail; or the one in fee simple and the other for life; and doth not set down which in fee simple, &c. in certain; yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men, *Habendum* the one to the one, and the other to the other, and say not which either of them shall have; this is void for incertainty. And if one have a reversion of land after a lease for years, and grant the land *Habendum* the reversion, or grant the reversion *Habendum* the land, this is good.

In some cases, a grant or gift may be void, at least to some persons and purposes when there are none of the defects aforesaid in it; as when it is made upon a corrupt contract, or to the end

Bro. Grant.  
154.  
Co. 1. 155.  
Plow. 520.

Dier 58.  
Co. 5. 1.

Pasc. 7 Jac.  
Dennis's  
case.

Craddock's  
case.  
Pasc. 7 Jac.  
Co. B.

Co. 9.  
Plow. 192.  
Co. 6. 36.

22 H. 6. 15.  
Plow. 28.  
Perk. Sect.  
75. 77.  
Plow. 151.

Co. 10. 107.  
Plow. 147.

21 H. 7.  
Co. super  
Lit.

7 H. 6. 4.  
21 H. 7.  
Perk. Sect.  
69.  
Bro. Grant.  
175.  
Kelw. 88.

(1) This in several the contru acceptable of grants in Where t understand words ther bam And But in co not one par A deed assurance, t 98. cites 9 As far as intention of Ld. Ch. J these two m reat hat th of the word remarkable Chief Justice such a mann firsty the int

end to defraud creditors of their debts, or purchasers of their lands bought, or the like; whereof see before in *Deed, chap. 4. numb. 5.*

21 H. 7. 5.  
Co. super  
Lit.

And in some cases, albeit there be no other fault in the grant, yet it may become void for want of some other matter that ought to be done, as inrolment, livery of seisin, attornment, &c. for where these things are requisite, the grant is not good until they be had, neither for that thing which will not pass without that ceremony, nor yet for that which otherwise would pass by the deed. And therefore if a feoffment be made of a manor to which an advowson is appendant, and no livery is made, so that the manor doth not pass; the advowson will not pass neither. Where a grant may be void by the refusal or waiver of the grantee, see before in *deed, numb. 6. chap. 4.*

7 H. 6. 43.  
21 H. 7. 23.  
Perk. Sect.  
69.  
Bro. Grant.  
175.  
Kelw. 88.

\* If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor, that neither he nor his heirs shall vouch the warrantor or his heirs upon the warranty; this is a good discharge of the benefit of the voucher, and doth bar the feoffee of it. And yet he may bring a *warrantia Chartæ* still. So if one grant to me a rent-charge, and afterwards I grant to him that he shall not be sued for this rent; this is a good grant to bar me of bringing an annuity for the rent; and yet I may distrain for the rent still. And so *à converso*, if I grant to the grantor, that he shall not be distrained for the rent; by this I am barred of a distress, but not of bringing an annuity for the rent. So if the Lord doth grant to his tenant, holding by Knight's service, that his heirs shall not be in ward, &c. or a man doth grant to his debtor that he will not sue him for the debt at all, or until such a time; or one grant to his lessee for life or years that he shall not be impeached for waste; all these are good discharges, and may be pleaded by way of bar to avoid *circuity of action*.

And now because attornment, as hath been shewed, is necessary in some cases to the perfection of some conveyances and grants of things that lie in grant and not in livery, we must therefore here ere we can go further, as a necessary appendix to Grants, add the learning of attornment, which followeth next in order (1).

(1) This chapter on grants, does not particularly contain any rules for their construction; it refers in several parts to the chapter on the exposition of deeds: that chapter contains some general rules for the construction of all parts of all kinds of deeds: and in addition thereto, it may not be altogether unacceptable to the reader to have subjoined some cases, which serve to establish the rules of construction of grants in general.

Where there is sufficient matter to guide the *intent* of the party, in such manner that lay persons may understand it; or sufficient matter is contained in the deed to *shew the intent*; there the deed, and the words therein, shall be taken so as to make the deed good, rather than destroy it.—*Windham v. Windham. And. 60.*

But in construing the deed according to the *intent*, the construction must be upon the whole deed, and not one part taken, and another left out.—*Baldwin v. Martin. And. 225.*

A deed ought to be so expounded, that all parts of it may stand together; and it being a common assurance, the judges shall break the deed in pieces to fulfil the *intents* of the parties: *per Archer J. Cart. 98. cites 9 Co. 47.*

As far as it may stand with the rule of law, it is honourable for all Judges to judge according to the *intention* of the parties, and so they ought to do. *Co. Lit. 314. b.*

Ld. Ch. J. *Willes*, in delivering the opinion of the Judges in the case of *Smith v. Packburst*, mentions these two maxims, "that such a construction ought to be made of deeds, *ut res magis valeat quam pereat* that the end and design of deeds should take effect" and "that such a construction should be made of the words in a deed as is most agreeable to the intent of the grantor," and expresses himself in these remarkable words:—These maxims, are founded upon the greatest authority, *Coke*, *Mowden*, and Lord Chief Justice *Hale*; and the law commends the *astutia* the cunning of Judges, in construing words in such a manner as shall best answer the *intent*; the art of construing words in such a manner as shall destroy the *intent*, may shew the ingenuity of counsel, but is very ill becoming a judge. 3 *Atk. 136.*

In expounding a grant according to the *intent*, it must be done according to the *intent at the time of the grant*; as, if I grant an annuity to I. S. until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards is made an Archdeacon, yet if I offer him a competent benefice according to his estate at the time of the grant, the annuity doth cease, *Cro. Eliz.* 35.

The law in the true construction of grants hath respect to the *estate of the grantor*;—to the *ability of the grantee*; to the *consideration which leads the estate*; and to the *recompence and loss which is sustained*—per *Doderidge J.*—in 3 *Bull.* 125, *Gough v. Howard*.

When there are two clauses in a deed, of which the latter is *contradictory* to the former; there the former shall stand: per *Nicholas J. Hard.* 94.

An *insensible clause* doth not make the residue of the deed vicious, which is sensible of itself. 1 *Saund.* 320. *Portage v. Cole*.

One clause may be explained by another. 7 *Rep.* 41. a. *Berisford's case*.

Clauses in company have other constructions than when they are alone, *Hob.* 275, *Earl of Clanrickard's case*.

The law will construe that part of a grant to *precede*, which ought to precede. 10 *Rep.* 28. *Sutton's Hospital case*.

No construction shall be made contrary to the very express words of the grant. *Winch.* 47, *Bishop of Gloucester v. Wood*.

*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* 2 *Saund.* 167, *Lanym v. Carne. Wing. Max.* 24.

When the words are *capable of different expositions*, that shall be taken which supports the declaration or agreement, and not that which defeats it. 1 *Salk.* 324. *Wyatt v. Aland*.

Construction of words shall be taken according to the vulgar and usual sense and manner of speech in those places, where the words are spoken. 1 *Bull.* 175, *Hewett v. Painter*.

Words in grants shall be construed according to a reasonable and easy sense, and not strained to things unlikely and unusual. *Hob.* 304. in case of *London v. The Collegiate Church of Southwark*.

*Verba posteriora, propter certitudinem addita, ad priora, quæ certitudine indigent sunt referenda.* *Wing.* 167. See the instances there put to support this maxim.

General words do not imply any certainty, nor shall conclude any common person to say, that he has nothing there; and the difference between general grants and particular appears in *Pl. C.* 191, *Wrottesley's case*.

Words subsequent may qualify and abridge, but not destroy, the generality of the words precedent. 8 *Rep.* 154. b. in *Albam's case*.

The rule, that the general words subsequent shall be restrained by the precedent particular words, is good and general; especially where the particular words comprehend and express a thing of an inferior nature to the general words subsequent; and that the general words are put without their dividing differences; for there indeed the generality of them shall be controlled by the bounds of the particular precedent words. But where the general words do put the proper difference of particulars, and besides take a higher species than the particulars mentioned before; as where the devise was of all his plate and jewels, and all other his estate real and personal, &c. there the general words shall over reach the particulars before, as if in the Archbishop of Canterbury's case, in 2 *Rep.* the words had been, [and all the ecclesiastical persons of superior or inferior rank;] they would have taken in Archbishops, Bishops, &c. per *Holt Ch. J.* 6 *Mod.* 107. *Countess of Bridgewater v. Duke of Bolton*.

When words contained in a deed go to several senses and purposes, the deed shall be taken according to the sense of the words, without taking or expounding any word to be vain or confounding the sense of it, as if in the deed be contained *dedi, remisi, &c.* this may be a deed of grant, feoffment, release, or confirmation, or all these as the case requires. 2 *And.* 20. *Earl of Pembroke v. Barkly*.

When words of divers natures are inserted in a conveyance, the grantee has election to use which of them he will. 2 *Brownl.* 292, *Smallman v. Powis*.

*Talis interpretatio semper fienda est, ut evitetur absurdum, et inconveniens, et ne judicium sit illud.* 1 *Co.* 52. a—*Wing.* 21.



## C H A P. XIII.

## Of an Attornment.

Co. super  
Lit. 309.  
Terms of  
the law.  
Plow. 25.  
Lit. Sect.  
551.

**A**N attornment is the agreement of the tenant to the grant of the seignior, or of a rent; or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reversion or of a remainder made to another. As where the Lord, or one that hath a rent out of land, doth grant over his seignior, or his rent to another; or one that hath a reversion or a remainder, after an estate for life or years, doth sell or give the same away to another; in these cases, the tenant of the land must have notice of this sale or gift, and of the alteration of the party to whom he must attend in his services; and he must give his consent to the same gift or grant, or else generally the same is not good. And this yielding of consent is called an attornment (1). And it is either actual, or verbal, or actual and verbal both.

That which is actual, is either implied and in law, or expressed and in fact. Of all which there are divers examples hereafter following.

Lit. Sect.  
551.  
Co. super  
Lit. 302.  
Lit. Bro.  
Sect. 267.  
129. 379.  
39 H. 6. 24.  
Co. super  
Lit. 323.  
315.  
Lit. Sect.  
608.

\* The end, effect, or fruit of this agreement is to perfect a grant, and to make a good conveyance of an estate; for, where this is needful, no rent nor reversion will pass without it; neither can the grantee of the seignior, rent, or reversion, bring any action of waste for waste done in the land, nor distrain for any rent or service upon the land, before this is done. But this is only a bare assent, and therefore it shall not nor will enure, or work, to pass any interest, to make a bad grant good, to enfranchise a villain, nor to give a man a tenancy by disseisin, intrusion, or abatement, neither shall it work by way of estoppel. And therefore, if a man gain a rent issuing out of land by coercion of distress or otherwise, and the tenant of the land attorn to him; this will not amend his estate. But otherwise a grant and the attornment of the tenant do as effectually pass the freehold and inheritance of the reversion of land, as a feoffment and livery of seisin of land do pass the possession of land.

Lit. Sect.  
579. 580.  
581.  
Co. 6. 68.  
Co. super  
Lit. 309.  
314. 320.

In most cases, where the grantee hath means to compel the tenant to attorn, there the attornment of the tenant is at least to some purposes needful; for howsoever it be true, that if a seignior, rent, services, reversion, or remainder be granted by

1. Quid.

2. Quatenus.

\* P. 254.

3. The effect

when the attornment is made, the grant has substance to the time of the being made.

4. Where and in what cases the attornment of the tenant is necessary: or not: and how: and to what intents.

(1) Attornment is now rendered unnecessary by the statute of 4 Ann. c. 16. § 9. which enacts that all grants or conveyances by fine or otherwise of any manors, or rents, or of reversions or remainders, shall be effectual without the attornment of any of the tenants; but it is thereby provided, that no tenant shall be prejudiced by payment of rent to any grantor or consor, or by breach of any condition for nonpayment of rent, before notice shall be given to him of such grant by the consor or grantee.—And by statute 11 Geo. 2. c. 19. § 11. reciting, that the possession of estates is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors who are thereby put out of the possession of their respective estates, and put to the difficulty and expence of recovering the same by action at law: it is thereby therefore enacted that all such attornments shall be void, and the possession not altered: but it is thereby provided that the said act shall not extend to affect any attornment made pursuant to any judgment at law, or decree or order of a Court of Equity; or made with the privity and content of the landlord or landlords, lessor or lessors, or to any mortgagees, after the mortgage is become forfeited.

fine,

fine, in this case the rent, seignior, &c. doth pass; so as the grantee may enter for a forfeiture upon the alienation of the tenant being tenant for life, years, by statute, or elegit, or upon an escheat of the tenant; or may seize a ward, or heriot, if it happen before any attornment be made; and if the reversion of a lease for years be granted by fine, and the lessee be ousted and the lessor disseised, the conusee may have an assise; and therefore as to all these purposes the attornment of the tenant is not needful; yet the grantee, his heir, or assignee, cannot distrain the tenant for rent, or bring any action that doth lie in privity between him and the tenant, as waste upon a waste done by the tenant, writ of entry *ad communem legem*, or *in casu proviso*, or *in consimili casu*, upon the alienation of the tenant, escheat upon the dying of the tenant without heirs, or ward upon the death of the tenant his heir within age, or writ of customs and services, until he have the attornment of the tenant; and therefore, as to all these purposes, the attornment of the tenant is necessary. And hence it is that the conusee of a fine hath means appointed him by the law to compel the tenant to attorn: for in case where the Lord doth grant his seignior to another, and the tenant will not attorn, the conusee before the fine be ingrossed may have a writ called a *Per quæ servitia*, and thereby

*Per quæ servitia.*

compel him to attorn. And in case where a man doth grant a rent to another, and the tenant of the land out of which the rent doth issue will not attorn, the conusee of the rent may have

*Quem redditum reddit.*

a writ called a *Quem redditum reddit*, and thereby compel him to attorn. And in case where a man doth grant a reversion, or a

\* P. 255.

remainder of his estate after tenant for life to another, \* and the tenant will not attorn, the conusee of the reversion or remainder

*Quid juris clamat.*

may have a writ called a *Quid juris clamat*, and thereby compel the tenant for life to attorn. And if the conusee of the fine die, before he have the attornment of the tenant, his heir, albeit he come to the thing descended by act of law, yet shall be in no better case than his ancestor was. And if the conusee of a fine by which he hath a reversion granted to him, before he hath gotten the attornment of the tenant, bargain and sell the reversion by deed indented and inrolled; the bargainee shall be in no better case than the bargainor was. And if a reversion be granted by fine, and the conusee before attornment enter and make a feoffment, and the lessee re-enter; in this case, the feoffee cannot distrain for the rent. And yet if there be Lord, mesne and tenant, and the mesne grant the services of his tenant by fine to another in fee, and after the grantee die without heir, and by this means the services of the mesne escheat; in this case, the Lord may distrain for them without any attornment of the tenant.

In these following cases, attornment in law, or in deed, is absolutely and to all intents necessary, *viz.* <sup>a</sup> Where one doth make a lease for life, or years, to one, and after doth grant the reversion or remainder after the same lease ended, to another by deed, in fee simple, fee tail, for life, or years; in this case the lessee for life, or years, must attorn. <sup>b</sup> So where the Lord doth grant his seignior or the services of his tenant by deed, in fee simple, or otherwise in fee tail, for life, or years to a stranger; in this case, the tenant must attorn. <sup>c</sup> So where the Lord of a manor doth make a feoffment

d] Co. 6.  
Lit. 312.  
Lit. Se.  
572.

Co. sup.  
Lit. 315.

Co. 2. 3.  
Lit. Bro.  
Sect. 29.  
Dier 30.  
Co. Sup.  
Lit. 312.  
Lit. Bro.  
Sect. 15.  
379. Bro.  
Attor. 5.  
Dier 26.  
Lit. Bro.  
349.

Old N. B.  
170.  
Co. super.  
Lit. 252.

Idem.

Idem.

Co. super.  
Lit. 310.  
Co. super.  
Lit. 311.

Co. 6. 68.  
Lit. Sect.  
584. 583.

Perk. Se.  
249, 255.

Lit. Sect.  
562.

Co. 2. 66.  
Lit. Sect.  
551. 567.

Co. super.  
Lit. 316.

b] Lit. Sect.  
551.

Co. super.  
Lit. 315.

Perk. Sect.  
636.

c] Co. 6. 68.  
Doct. &  
Stud. 35.  
Lit. Sect.  
553.

And so  
was agree  
in M. 37.  
38 Eliz.  
B. R.

Perk. Se.  
249, 255.

Lit. Sect.  
562.

Hil. 8 J.

Dier 116.

seoffment of his manor; in this case the services of the tenants will not pass without their attornment. <sup>d</sup> So if another man have a rent service, rent charge, or rent seek, issuing out of my land, and he doth grant this rent to a stranger; in this case I must attorn to this grant to the stranger. And if in these cases the tenant doth not attorn, the grant of the reversion, &c. is merely void.

If a reversion be granted after an estate of a tenant by statute merchant, staple, or elegit, or after an estate that any one hath until debts be paid, or the like; in these cases, the tenants must attorn, or this grant will not be good.

If one make a lease for years of land rendring rent, and after he doth grant the reversion to another for years, to begin after the death of the grantor; in this case, it is needful that the lessee for years in possession do attorn to make this grant good. But if one make a lease of his land to one for ten years, and after make a lease of it to another, to have and to hold from the end of the said term of ten years for the term of twenty years, in this case, it seems it is not needful that the first lessee doth attorn, but the grant is good enough without it. If one make a lease to another for twenty years, and he make a lease over to a third for ten years rendring a rent, and then doth grant the reversion to a stranger; in this case, it is needful that the lessee for ten years do attorn: but if the lease for ten years be made without any reservation of rent, *contra*. For it is a rule, that where there is no tenure, attendancy, remainder, rent, or service to be paid or done, there attornment is not necessary. And hence it is, that where one doth grant common of pasture appendant or appurtenant, or estovers out of land, there needs no attornment of the tenant to make this grant good. And if a rent or common be granted to one for life, and after the reversion of it be granted to another; that in this case there needs no attornment to make this second grant good. And if one make a lease to one for ten years, and then make a lease to another for twenty years; in this case the second lease is good for the ten years to come after the first ten years ended, without any attornment of the first lessee.

\* P. 256.

quare

And so it was agreed in M. 37. 38 Eliz. B. R.

Perk. Sect. 249, 259.

Lit. Sect. 562.

Hil. 8 Jac.

Dier 118.

If a Lord exchange the services of his tenant with another for land; in this case the attornment of the tenant, by whom the service is to be done, is necessary to perfect this exchange.

If there be Lord and tenant in fee simple, and the tenant doth make a lease to another man of the tenancy for life, and the Lord doth grant the seigniority to the tenant for life in fee; in this case the tenant in reversion must attorn to the tenant for life upon this grant of the reversion, or the grant is not good.

If I be seised of a reversion after an estate for years, and I grant it to the use of myself for life, and after to the use of another and his heirs in fee, and after I grant my reversion for life to another; in this case it is needful that the tenant for years attorn to this grant.

If a lease be made to *I. S.* for his life, and afterwards another lease is made of the same land to *I. D.* for his life; in this case, it seems that *I. S.* must attorn to this second grant, or that the grant will not be good.

An



An estate of a feignory cannot be gained by a disseisin, abate-  
ment, or intrusion, without an attornment. And therefore if one  
disseise another of a manor which is part in demesne, and part in  
services, the services are not gained until the tenants attorn.

In all cases for the most part where there is no means provided by  
law to compel the tenant to attorn, there their attornment in law,  
or in deed, is not necessary, unless there be some special default  
in the grantee. *Quod remedio destituitur, ipsa re valet, si culpa  
absit.* And therefore an attornment is not necessary in these cases  
following, viz. • Where one doth grant a rent, reversion, re-

*attornment is  
never necessary in  
the grant of a term:*  
• P. 257.

mainder, service, or feignory to another by way of devise by a  
last will and testament, or by Letters Patents from the King, or  
where such \* things are granted by matter of record from a sub-  
ject to the King. So when the thing granted doth pass by way of  
use, and doth vest by force of the statute of uses: as if one that  
is seised of land in fee doth make a lease of it for life, or years,  
to I. S. and after levieth a fine; or doth covenant to stand seised  
of the reversion of this land (or of the land itself which is all one)  
to the use of another; or doth bargain and sell the reversion in  
fee, or for years; in these cases, the tenant need not to attorn:  
but if A. grant a reversion to B. to the use of C. and the deed is  
not inrolled, or the use arise not upon consideration of blood, &c.  
in this case, if the tenant doth not attorn the reversion will not  
pass. • If one by a common recovery suffered, grant a reversion  
to the use of himself, his wife, or children; in this case, there  
needs no attornment of the tenant by the statute of 7 H. 8. cap. 4.  
So where one doth come to any such thing by title or feignory  
paramount, as by escheat, surrender, or forfeiture, or by descent;  
in all these cases, and the rest before, the attornment of the ten-  
ant is to no purpose, neither to pass the thing as to the estate,  
nor to make a privy to distrain or bring action of debt. And  
therefore if there be Lord, mesne, and tenant, and the mesne  
grant the services of his tenant by fine to another in fee, and after  
the grantee dieth without heir; in this case the services of the  
mesnalty shall come to the Lord paramount and he may distrain  
for them, or bring any action that lieth in privy for them with-  
out any attornment. So if lessee for life of a manor surrender his  
estate to the lessor; there needs no attornment of the tenants  
of the manor to make this estate to pass. So if the reversion of a  
tenant for life be granted to another in fee, and the grantee die  
without heir, so that the reversion doth escheat; in this case, the  
Lord may distrain, or bring any action of waste, &c. without any  
attornment. So if a reversion descend to an heir from his ancestor;  
in this case, it will vest in the heir without attornment, and at-  
tornment in this case is not necessary. So if the consuee of a sta-  
tute merchant extend a feignory, or rent, for debt; the feignory  
or rent shall be vested in him without any attornment of the ten-  
ant.

If a copyholder in fee make a lease for years, by licence of the  
Lord, rendring rent, and after surrender the reversion to the use of  
I. S. in this case, it seems an attornment of the tenant is not need-  
ful, and I. S. shall have the rent without any attornment.

If

Curiam.  
& 38 El.  
B. R.  
Co. 2. 30  
super Lit.  
311.

Lit. Sect.  
578.

Lit. Sect.  
575.

Lit. Sect.  
574.

Agreed in  
Curnock's  
case.  
M. 3. Jac.  
Co. B.

Lit. Sect.  
555.

Co. super  
Lit. 319.

Lit. Sect.  
554. 556.  
Co. super  
Lit. 311.

Lit. Sect.  
556.

Idem.

Co. super  
Lit. 312.  
Lit. Sect.  
558.

Lit. Sect.  
571.  
Co. super  
Lit. 316.

317.  
Co. super  
Lit. 312.

*see page 254*

Caria M. 37.  
& 38 Eliz.  
B. R.  
Co. 2. 35.  
super Lit.  
311.

Lit. Sect.  
578.

If one grant the reversion of copyhold lands for life, or years; or grant the seignior of copyhold lands of inheritance; in these cases there needs no attornment of the tenants to make the grants good. And so also is the law for an estate at will by the common law.

\* If a lease be made to one for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life, and the tenant for life doth grant his remainder in fee; in this case, there needs no attornment of the tenant in tail, but the remainder will pass by the deed presently without any attornment at all. • P. 258.

Lit. Sect.  
575.

If one lease for life, the remainder for life, and after the lessor release all his right in the land to him in remainder for life; in this case there needs no attornment of the lessee for life, to perfect this release.

Lit. Sect.  
574.

If two or more joint-tenants, make a lease for life, rendering rent, and one of them doth release the rent to the other; in this case, there needs no attornment to make the rent to pass.

Agreed in  
Carnock's  
case.  
M. 3. Jac.  
Co. B.

In all cases where the grant is in the personalty, there needs no attornment. And therefore in grants of annuities, which do charge the person of the grantor only, and not his land, there needs no attornment. And in all cases where there is an attornment in law, there needs no attornment in deed.

Lit. Sect.  
555.

If there be Lord, mesne, and tenant, and the Lord grant the fee of the seignior; in this case, the mesne, and not the tenant, must attorn. 5. By whom an attornment may and must be made: or not.

Co. super  
Lit. 319.

If one make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the Lord grant the seignior; in this case it seems the grantee, and not the first lessee for life, must attorn.

Lit. Sect.  
554. 556.  
Co. super  
Lit. 311.

If there be Lord and tenant, and the tenant make a gift in tail, or lease for life, of the land, and after the Lord grant the services to a stranger; in this case, the tenant for himself, and not the tenant in tail, or for life, must attorn: for it is a maxim in law, that no man shall attorn to any grant of any seignior, rent, service, reversion, or remainder, but he that is immediately privy to the grantor. But to the grant of a rent-sock, or rent charge, issuing out of such land as before, the under-tenant in tail, or for life, and not the immediate tenant himself, must attorn.

Lit. Sect.  
556.

If there be tenant for life, the remainder in fee, and the Lord grant the services to a stranger; in this case the tenant for life, and not him in remainder, must attorn.

Idem.

If there be tenant for life, the remainder in tail, and he in the reversion after their estates doth grant his reversion to a stranger; in this case, if either of them need to attorn, it must be the tenant for life.

Co. super  
Lit. 312.  
Lit. Sect.  
558.

If a woman that hath a husband be to attorn, the husband may Husband and must do it for her; and the attornment of the husband for the and wife. wife, whether it be expressed or implied, will bind the wife.

Lit. Sect.  
571.  
Co. super  
Lit. 316.  
317.  
Co. super  
Lit. 312.

\* If one make a lease for years of land, the remainder for life, • P. 259. and after the lessor doth grant the reversion; in this case, the tenant for life or years either of them may attorn.

If a rent charge be issuing out of land, and the tenant be disseised of the land; in this case, the disseisor must attorn to a grantee of the land. But in case of the grant of a rent service, the

the disseisee may attorn if he will, for the privity is between the Lord and the disseisee only.

If a man make a lease for life to *I. S.* of land, and after grant a *Ibid.* rent charge out of it to *I. D.* and after he grant over this rent to another; in this case, the lessor, and not *I. S.* must attorn.

The tenant in dower after she hath assigned over her estate, and not the assignee, must attorn to the grant of the reversion. And yet some hold that the assignee also may attorn. The same law is also of the tenant by the courtesy: but it is not so in other cases; for if the reversion of lessee for life be granted, and lessee for life assign over his estate, the assignee, and not the lessee, must attorn. Co. super Lit. 316. 8 E. 4. 10.

If lessee for life assign over his estate upon condition, and then the reversion is granted; in this case, the assignee, and not the lessee for life, must attorn. Co. super Lit. 315.

If a tenant in fee simple, that ought to attorn to a grant of a feignory or rent, die before he make an attornment, his heir must attorn, and an attornment made by him is good. So if he grant away his land before he make his attornment, his grantee may attorn, and an attornment made by him will be good enough. Co. super Lit. 315. Perk. Sect. 231.

If a Lord of a manor make a lease of his manor for life or years, and the freeholders and others do attorn to the lessee, and after he grant away the reversion of the manor to a stranger; in this case, the lessee for life or years, must attorn, and this will bind all the freeholders. Co. super Lit. 311.

If there be Lord and tenant by homage, fealty and rent, and the tenant is disseised, and then the Lord granteth the rent to another; in this case, the disseisor, and not the disseisee, must attorn; but if he grant the whole feignory, the disseisee may attorn.

Infant.

A voluntary attornment, where it is needful, may be made by an infant, or one that is deaf and dumb (who may do it by signs). But one that is *non compos mentis* cannot make an attornment. Co. super Lit. 315.

*Non compos mentis.*

6. To whom an attornment may and must be made: or not.

\* P. 260.

The attornment must always be made to the grantee of the reversion, rent, &c. according to the grant; whether the attornment be express or implied. But if divers do take by the grant, the attornment may be made to one of them, and this shall avail the rest; as if a reversion or a rent be granted to two or more, and the tenant attorn to one of them, this is good to vest and settle the thing granted in them all according to the grant. And if a lease be made by deed of a reversion to *A.* for life, the remainder in fee to *B.* and the tenant attorn to *A.* this is a good attornment to settle the remainder in *B.* But if the tenant attorn to *B.* during the life of *A.* this is not good for *A.* howbeit, if the tenant for life die before the attornment be made; in this case, the attornment may be made, and this shall be sufficient to perfect the grant of the remainder to *B.* Co. super Lit. 310. 312.

If I grant a reversion to one man, and before the attornment of the tenant had to perfect the grant, he doth sell this reversion to a third man; in this case, the tenant may attorn to the second grantee, and this will make the grant good to him. But if the attornment be made to both the grantees, it is void for uncertainty. Co. 6. 68. 11 H. 7. 12.

An



Co. super  
Lit. 310.  
Harding's  
case.

An attornment may as well be made to *cestuy que use* of a reversion, as to the grantee of the reversion himself. And it seems it must be made to him, and not to the grantee of the reversion. For it was agreed in the court of wards, *Hil. 18 Jac.* That if a reversion be granted to *B.* to the use of *C.* that the attornment must be made to *C.* and not to *B.* who is but an instrument.

*quod.*

Co. 1. 151.  
super Lit.  
310.  
Lit. Sect.  
551.  
Perk. Sect.  
263. 231.  
Co. super  
Lit. 315.  
2. 35.

In all cases regularly where attornment is necessary, it must be made in the life time of the parties grantor and grantee, or exchangor or exchangee; for if either of them die before the attornment be made, the grant or exchange is void. And therefore if a manor be granted, and livery of seisin be given upon the demesnes thereof, and one of the tenants die before attornment be made by him, his tenement will not pass, and the grant as to that part will be void; for in this case all the tenants, but tenant at will, must attorn. And albeit the grant of the reversion be to begin at a day to come, and after the death of either of the parties, yet must the attornment be made in the life-time of the parties, or otherwise the grant will not be good. And yet an attornment may be made after the death of the tenant, by his heir; and after the conveyance of the tenant, by his assignee.

7. When and at what time the attornment must be made.

Co. 2. 35.

If a lease be made of a reversion to begin at a day to come; in this case the attornment may be made before or after the day, so it be made in the life time of the parties.

Co. super  
Lit. 310.

If one grant his reversion of white acre or black acre, and the tenant attorn to the grant, before the grantee have made his election which acre he will have, this is a good attornment.

Co. super  
Lit. 309.  
310. 8. 82.  
4. 61.  
Kelw. 163.

If a man grant his reversion by deed to one, and after, and before the tenant do attorn, he levy a fine or make a feoffment of the land to another; in this case it seems the attornment after comes too late; but if the fine or feoffment be \* but of part of the land \* P. 261. granted before in reversion; in this case the first grant after attornment shall be good for the residue. And if a woman sole grant a reversion, and after, and before attornment, she marry with a stranger, and after the tenant attorn; in this case the attornment comes too late, for the marriage is a countermand of it. And if a reversion of an estate for life or years be granted, and the grantor before attornment doth confirm the estate of the tenant for life or years, and so change the estate, and after the tenant attorn, in this case the attornment comes too late.

Co. super  
Lit. 309.  
310. 315.  
Lit. Sect.  
551.  
Flow. 344.

To the making of a good attornment where it is needful divers things are required. 1. It must be made by the person that ought to make it. 2. It must be made to the person that ought to take it. 3. It must be made in time convenient. 4. If it be an express attornment, the tenant must first have notice of the grant of the reversion, rent, &c. to which he must attorn; but otherwise it is of an attornment in law, for there notice in all cases is not necessary. 5. And it must be done in that manner the law doth prescribe. And for this, it is to be known that it may be made by words, or by deeds, and without any writing, or by deed or writing (and this is the safest way to do it). And any words, written or spoken by the tenant, that do import an assent and agreement to the grant of the reversion, rent, &c. in such manner as the same is

8. The manner of making an attornment: and what shall be said a good attornment: or not. Notice.

made after notice given to him of the grant, whether it be in the presence or the absence of the grantee of the reversion, rent, &c. will make a good attornment in deed. And therefore, if the tenant after knowledge of the grant, use these words following, or any others to the like effect, to the grantee, *viz.* I do attorn, or turn tenant, to you according to the grant; or, I become your tenant; or, I agree to the grant; or, I am well content with the grant; or, God send you joy of it; these are good express attornments. And if the tenant, after knowledge of the grant, pay, do, or deliver, all, or any part of the rent, or service, before, or at the time when the same is due, to the grantee, or give a penny, or farthing, an ox, or a knife, or any such like thing, or any other valuable thing, in the name of attornment, or in the name of seisin of the rent; this is a good express attornment; and that attornment, which is made by words, and deed or sign both, is the best; for that doth leave a more deep impression in the mind of the witnesses. But if one have a rent charge issuing out of my land, and he grant it to a stranger; and I give him an ox to put him in possession of the rent; it seems this is no good attornment.

If a man grant his reversion of my living to *I. S.* and his bailiff, that doth use to gather his rents, faith to me, that *I. S.* hath bought it, and I must hereafter pay my rent to him, and I tell him I am glad of it; this is a good attornment. And that, albeit it be in the absence of *I. S.* And it is not material whether the stranger know of the grant, or not, so the tenant know of it. And an attornment made to the Lord's Steward in the court, in the absence of the Lord, is a good attornment. For it is sufficient, if the tenant have notice, that he attorn to the grant in the presence of any whomsoever. Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the tenant for life, having notice of the grant, faith to a stranger in his absence, that is the party, I am well pleased that the grant is made to him; it was adjudged to be good.

If a reversion be granted to one for life, and after the same reversion be granted to him for years, and the tenant attorn to both the grants at once; this attornment is void for uncertainty. So if one grant his feignory to *I. S.* Bishop of *London*, and his heirs, by one deed, and grant the same to *I. S.* Bishop of *London* and his successors, by another deed, and the tenant attorn to both grants at once; this attornment is void for uncertainty. So if a reversion be granted to two several persons by several deeds, and the tenant attorn to both the grants at one time; this attornment is void for uncertainty; and neither of the grants are perfected by the attornment in these cases. The implied attornment, which also doth amount to an express attornment, is made divers manner of ways. For if the tenant, after notice of the grant of the reversion, pay his rent to the grantee, or surrender his estate to the grantee, or pray in aid of the grantee, or accept a grant of the reversion or remainder from him that hath it, this is a good attornment in law. But if the tenant, after the grant of the reversion, not having notice of the grant, pay his rent to the grantee, as a receiver, bailiff, &c. this is no good attornment. And therefore if the bailiff of a manor shall purchase the manor, or the reversion

Chap.

Lit. Sect.  
558. 560.  
&c.Co. super  
Lit. 313.Co. super  
Lit. 313.  
Lit. Sect.  
573.Lit. Sect.  
559.Lit. Sect.  
564.Co. super  
Lit. 310. aLit. Sect.  
563.Lit. Sect.  
576. 577.  
Co. super  
Lit. 319.  
Dier 212.  
Co. 6. 68.  
5 113.

Hil. 8 Jac.

reversion of one of the tenements, and the tenant, not knowing of the purchase, pay his rent to him, as he was wont to do; this is no good attornment in law. So if a man seised of a feignory levie a fine of it, and then taketh back an estate in fee, and the tenant, having no notice of all this, doth pay his rent to the conusor, as he was wont to do; this is no good attornment in law, to perfect either of these grants.

If there be Lord and tenant, and the tenant let the land to a woman for life, the remainder in fee, and the woman doth take a husband, and after the Lord doth grant the services to the husband in fee; in this case, this acceptance of the deed, by him that ought to attorn, is a good attornment in law. So if in this case the tenant lease to a man for life, the remainder over, and the Lord grant the services to the tenant for life, and he accept thereof; this is a good attornment in law.

If the Lord by deed grant his feignory to the tenant of the land and to a stranger, and the tenant doth accept of this deed; this is a good attornment in law, to extinguish a moiety, and to vest the other moiety in the other grantee. So if one make a lease to *I. S.* for life, and after confirm his estate, the remainder over to *I. D.* and the lessee for life doth accept of the deed of this confirmation and grant; this is a good attornment in law, and doth vest the remainder in *I. D.*

If there be Lord and tenant, and the tenant take a wife, and after the Lord doth grant the services to the wife and her heirs, and the husband doth accept of the deed of this grant; this is a good attornment in law.

If the conusor of a fine of services, sue a *Scire facias* to have execution of the services, and hath judgment to recover; this is a good attornment in law.

If a woman grant a reversion to a man in fee, and after marry with the grantee; this is a good attornment in law, to perfect this grant made to the husband.

If a Lord grant his feignory, and there be twenty manner of services, and the tenant, with what intent soever it be, pay or perform in deed any parcel of the services to the grantee; this is a good attornment in law for all the services.

If I be seised of land in fee, and make a lease for life or years of it, or it be extended by a statute or *Elegit*, and then I make a feoffment of this land, and give livery of seisin upon it, and so put out the tenant, and after the tenant (or one of the tenants, if there be many) re-enter; this is a good attornment in law. And so also it seems is the law, if the lessee for life recover in an assise. But if a man make a lease for life, and then the lessor grant the reversion for life, and the lessee attorn, and after the lessor enter and make a feoffment in fee, and so disseise the lessee for life, and then the lessee re-enter; this is no good attornment in law by the grantee for life. And if the conusor of a reversion by fine disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter; this is no good attornment in law to the feoffee, to enable him to distrain, &c.

If one grant the reversion of a lease of a term of years, and before any attornment made, the lessee for years doth grant his term to the grantee of the reversion; in this case, this is no good attornment in law, to make the reversion pass.

If

\* P. 263.

in any other case the attornment would come too late, for the grant without attornment would be voidable by means of the feoffment



If one have land, and a rent issuing out of other land, both in one county, and he grant both by deed, and give livery of seisin of the land in the name both of the land and of the rent; this is no good attornment in law, to make the grant of the rent good.

If lessee for life, or years, subscribe his name as a witness to the sealing and delivery of the grant of the reversion, made by the lessor to a stranger; this is no good attornment in law, for he may do this and not have notice: but if he have notice of the grant, and \* then put his hand to it; this is an attornment, *curia B. R. H.*

\* P. 264.

Attornment to part of the grant good for the whole.

If a reversion be granted of two acres, or for forty years, or if services be granted, and the tenant doth attorn for one acre, or for part of the forty years, or for part of the services; this shall extend to all, and is a good attornment for both the acres, all the forty years, and all the services. And that, albeit the tenant say expressly it shall be good but for a part, and not for the whole. And so also it is of an attornment in law. And therefore if the grantee by fine of services, sue a *Scire facias* to have execution of any part of the services, and have judgement to recover any part; or a lessee of three acres surrender one of them to the grantee of the reversion of all the three acres; this is a good attornment for the whole. But if one attorn for part of the land, or for part of the services, in case of the grant of a reversion of land, or the grant of services, and have no notice of the grant of any more; this attornment is not good for any part, but void for all.

Attornment to one good to others.

If a feignory, reversion, or the like, be granted to two or more, and the tenant after notice thereof doth attorn to one of them; this is a good attornment, to perfect the grant to both or all of them. But if one die before attornment, and the tenant attorn to the survivor or survivors; this shall not avail the heir of him that is dead; but it is good to perfect the grant to the survivor or survivors, to whom it is made.

If a reversion be granted to husband and wife, and the tenant attorn to the wife in the absence of the husband; this is a good attornment, to perfect the grant to them both. But if a reversion be granted to two men, and the tenant have notice only of a grant made to one of them, and he attorn to him only; this attornment is void, and not good to perfect the grant to either of them.

Attornment by one good for others.

If two joint-tenants be for life, or years, and the reversion of their estate is granted to a stranger, and one of them attorn to the grant of the reversion; this is a good attornment for both of them. The like law is for tenants in common. But if *A. B. C.* and *D.* be lessees for years, and *C.* and *D.* be outlawed, so as they forfeit their parts to the King, and the King become tenant in common with *A.* and *B.* and after the reversion is granted to a stranger, and *A.* and *B.* attorn; this is no good attornment to perfect the grant of the reversion; for *C.* and *D.* cannot attorn, and the attornment of *A.* and *B.* for the King and themselves is not good.

9. Who shall be compelled to attorn: or not: and where.

Attornment made by the husband is good for the wife: whereof see before at *Numb. 5.*

In all cases for the most part where attornment is needful, the tenant, whether he be tenant in fee-simple, for life, years, by statute, elegit, or as executor until debts be paid, shall be compelled

\* P. 265.

To. sup.  
Lit. 318.

So was it held in Brookenbury & Martials case. 5 Eliz.

Co. 2. 68.  
super Lit.  
297. 314.  
309. Lit.  
lect. 564.

Co. 6.  
super Lit.  
318.

Co. super  
Lit. 318.  
3. 86.

Co. super  
Lit. 318.  
3. 86.

Co. super  
Lit. 297. 2.  
68. 67.

Co. super  
Lit. 309.  
310. 297.  
See before

Calvins case  
Paic. 7 Jac.  
B. R.  
Co. 2. 68.

Co. super  
Lit. 320.

Co. 2. 66. 67.  
Lit. Sect.  
566.

6 Car. in  
the Lord  
Brooke case  
in the Court  
of Wards.

Co. super  
Lit. 310.

Co. 6. 68.  
9. 84. super  
Lit. 315.

Co. super  
Lit. 310.

compelled to attorn. And albeit the tenant be an infant, and come to the land by purchase or descent, yet he may be compelled to attorn; but then in this case his attornment shall not prejudice him; for when he is of full age, he may disclaim, or say he doth hold by less services.

Co. super  
Lit. 316.  
318.

If there be tenant in tail of a reversion, and he grant this over to a stranger; in this case the tenant in possession may be compelled to attorn. But if the reversion, upon the estate of the tenant in tail, or upon the estate of the tenant in tail after possibility of issue extinct, be granted, such a tenant may not be compelled to attorn; and yet such a tenant may attorn *gratis* if he will. And the assignee of the estate of such a tenant in tail after possibility, &c. is compellable to attorn. And if one make a gift in tail, the remainder in fee, and the seignior, or a rent charge issuing out of the land, is granted in fee by fine; in this case, the tenant in tail may be compelled to attorn.

Co. 6. 68.  
super Lit.  
318.

In all cases for the most part where attornment is not needful, there is no means to compel the tenant to attorn. And therefore the tenant cannot be compelled to attorn to him that comes to a reversion or remainder by escheat, forfeiture, &c.

Co. super  
Lit. 318.  
3. 86.

If one grant his reversion of land in mortmain, without a licence, the tenant may not be compelled to attorn, until there be a licence had from the King.

Co. super  
Lit. 318.  
3. 86.

Also it is a general rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorn. As if an infant levy a fine, this is defeasible by writ of error during his minority, and therefore the tenant shall not be compelled to attorn. So if the land be holden in ancient demesne, and he in the reversion levieth a fine of the reversion at the common law; the tenant shall not be compelled to attorn, because the estate that passeth is reverfible by a writ of deceit.

Co. super  
Lit. 309.  
310. 297.  
See before.

If the grant be absolute, and the attornment be on condition; yet this shall enure according to the grant. So if the attornment be but to part of the thing or part of the time granted; this shall enure to perfect the grant for all. So if the attornment be made but to one of the grantees, it shall enure to the rest. So if the attornment be made to the particular tenant, it shall enure to him in the remainder, to perfect his estate also.

10. How an  
attornment  
shall enure  
and be  
taken.

Co. super  
Lit. 320.

If the estate of the tenant be with a privilege annexed, as without impeachment of waste, or the like, and the tenant attorn generally without any saving of his privilege; if the attornment be *gratis* and voluntary, whether it be an attornment in law or in deed, this shall not enure to extinguish his privilege: but if the attornment be made by the compulsion of a writ in this manner, and without this saving, he hath lost his privilege \* P. 266. for ever.

Co. super  
Lit. 310.

If a reversion, &c. be granted to two several men one after another, and he that hath the latter grant get the attornment of the tenant to his grant before the other; in this case, this shall enure to perfect the latter, and the first grant now cannot be made good.

Co. super  
Lit. 310.

If a reversion be granted to a man and woman unmarried, and before attornment made they intermarry, and then the tenant attorn; in this case they shall have the estate by moieties.

An

11. How an  
attornment  
shall relate.

*not true  
except in the  
case of the  
feoffment of a  
manor, &c. fine  
lc*

An attornment as to the party grantor shall have relation to the Co. super time of the grant, to make the thing to pass out of the grantor *ab initio*, albeit it be made many years after the grant; and therefore all acts done by him after the time of the grant, and before the attornment, to the prejudice of his own grant, as granting of rents, entering into statutes, or the like, are void as to the land, to charge it; and hence it is that if a reversion be granted to an alien, and before the attornment of the tenant he is made denizen; in this case, the King upon office found shall have the land; and yet it shall not so relate, as to make the tenant chargeable to the grantee for any mesne arrearages, or for any waste in the lands from the time of the grant to the time of the attornment. But in respect of a stranger it shall not relate at all. And therefore if two deeds be of a reversion at several times, and he whose deed was made last gets attornment first, the reversion doth pass to him; and though the other get attornment afterwards, yet this will not help him by relation; and albeit the former grant of the reversion be in fee, and the latter for life only, yet the law will be all one in both cases.

And now having done with this, we come to a *lease*.

Termes o  
the law.  
Co. super  
Lit. 42. 4.  
Justice Do  
drige trea  
tise called  
the use of  
the law.  
Bro. Leaf  
60. 437.  
Plow. 421  
432.  
Dier 125.

See Grant  
Numb. 4.  
Co. 6. 36. 3  
35. 1. 154  
155.

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(2) Ant  
(3) Mr  
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## C H A P. XIV.

## Of a Lease.

Terms of  
the law.  
Co. super  
Lit. 42. 45  
Justice Dod-  
drige trea-  
tise called  
the use of  
the law.  
Bro. Leases  
60. 437.  
Plow. 421.  
432.  
Dier 125.

A Lease doth properly signify a demise or letting of lands, rent, *i. e.* *Quid*, common, or any hereditament, unto another for a lesser time than he that doth let it hath in it. (For when a lessee for life or years doth grant over all his estate or time unto another, this is more properly called an assignment than a lease.) And this, albeit it may be made and done by other words, yet it is most commonly and aptly made by the words demise, grant, and let. And in this case he that letteth is called the lessor, and he to whom it is let the lessee. This word also is sometimes although improperly applied to the estate, *i. e.* the title, time, or interest the lessee hath to the thing demised, and then it is rather referred to the thing taken or had, and the interest of the taker therein; but in this place, it is applied rather to the manner or means of attaining or coming to the thing letten. And in this sense it is sometimes made and done by record, as fine, recovery, &c. and sometimes and most frequently by writing called a lease by indenture, albeit it may be made also by deed poll. And sometimes also it is (as it may be of land, or any such like thing grantable without deed for life or never so many years) by word of mouth without any writing, and then it is called a lease parol (1). And hence comes the division of a lease parol, and a lease in writing. And all these ways it may be made either for life, *i. e.* for the life of the lessee, or another, or both; or for years, *i. e.* for a certain number of years, as ten, an hundred, a thousand, or ten thousand years, months, weeks or days, as the lessor and lessee do agree. And then the estate is properly called a term of years: for this word term doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time: these leases also for years do some of them commence *in presenti*, and some *in futuro*, at a day to come: and the lease that is to begin *in futuro*, is called an *interesse termini*, or future interest (2). Or at will, *i. e.* when a lease is made of land to be held at the will and pleasure of the lessor, or at the will and pleasure of the lessor and lessee together: and such a lease may be made by word of mouth as well as the former (3).

See Grant  
Numb. 4.  
Co. 6. 36. 34.  
35. 1. 154.  
155.

Regularly these things must concur to the making of every good lease. 1. As in other grants, so in this, there must be a lessor, and he must be a person able, and not restrained to make lease.

3. Things  
necessarily  
required in  
every good  
lease.

(1) But by stat. 29th Car. 2. c. 3. leases of lands must be in writing and signed by the parties themselves, or their agents duly authorized; otherwise they will operate only as leases at will, except leases not exceeding three years.

(2) *Ante* page 241.

(3) Mr Justice Blackstone in a note to the 2d vol. of his *Com.* p. 323. for the learning relative to leases, which he says is very curious and diffusive, refers the student to *Bac. Abr. Tit. leases and terms for years*; where the subject is treated in a perspicuous and masterly manner, being supposed to be extracted from a manuscript of Sir G. Gilbert. The Editor of the 13th edit. of *Co. Lit.* in note 5. to p. 45. a. speaks of the same book with equal commendation.

that

*Farmen v Edwards*  
*(Douglas 187. n)*

*Assignment.*  
*Doc v Bateman*  
*2 B & Al. 168.*  
*when the whole term*  
*Lessor is granted to*  
*Lessee. i. e. assignment*  
*Lessee. 45. He who has*  
*rights continues.*

\* P. 267.

*Yatchey v Holmes*  
*1 Strange 435*  
*when a man has*  
*2. Quod. three years*  
*plex. to come & ends*  
*for 3 yrs by parole*  
*sufficient as an*  
*underlease.*

*commit*  
*Doc v Cochen*  
*2 Wils. 275*  
*when the case is 210.*  
*3. Term. 543*  
*Parsonson v Webber*

Term of  
years.

*Interesse*  
*termini, or*  
*future in-*  
*terest.*

that lease. 2. There must be a lessee, and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised be not grantable without a deed, or the party demising not able to grant without deed, the lease must be made by deed. And if so, then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, &c. required in other grants, must be observed. 5. If it be a lease for years, it must have a certain commencement, at least then when it comes to take effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is express, or by reducing it to a certainty upon some contingent precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seisin, attornment, and the like, in cases where they are requisite. 7. There must be an acceptance of the thing demised, and of the estate, by the lessee. But whether any rent \* be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons. Of which see *infra*.

\* P. 268.

4. What shall be said a good and a sufficient lease for life or years: or not.

1. In respect of the persons of the lessor, and the lessee, the thing leased, and the estate, property, or possession of the lessor therein.

For the ability and capacity of the lessors and lessees; and what shall be said a good lease or not, in respect of the ability of the lessor, and the capacity of the lessee; and the description of their persons; the nature and description of the thing demised; and what mis-recital, or mis-nomer will hurt, or not; see *Grant numb.*

4. and *infra numb.* 5, 6, 7.

Leases for life, or years, or at will, may be made of any thing corporeal or incorporeal, that lieth in livery, or grant. Also leases for years may be made of any goods or chattles. See for this, *Grant numb.* 4.

A man seised of an estate in fee simple in his own right of any lands or tenements, may by deed or writing in the country, or without writing by word of mouth, make a lease of it for what lives or years he will (1). And he that is seised of an estate in tail of any lands or tenements, may make any lease out of it for his own life, but not longer; unless it be by fine or recovery, or it be such a lease as is warranted by the statute of 32 H. 8. (whereof see more *infra*.) And he that is seised of lands or tenements of any estate for his own or another's life, may make what lease for years he will of it, and it will be good as long as the lease for life doth last. And he that is possessed of lands or tenements for years may make a lease of it for all or part of the years, and these are good leases. The tenants for life or years may also assign over all their estates if they please. And if such tenants make leases for longer time, as if lessee for years make a lease for life; it seems by this the land will pass for life, if the term of years last so long. But if he give livery of seisin upon it (as he must to make the lease for life good) this is a forfeiture of the estate for years (2).

(1) See the notes before as to the stat. 29. Car. 2. c. 3.

(2) See accordingly *ante* in page 242.

9 H. 7. 24. If an infant be seised of land in fee-simple, and he make a lease Forfeiture.  
 18 Ed. 4. 2. for years of it rendering no rent; this lease is void. But if there Infant.  
 Plow. 545. be a rent reserved upon the lease, then the lease is but voidable,  
 and may, by the acceptance of the rent by the infant after his full Acceptance.  
 age, be made good (1).

Lit. cap. Joint-tenants, tenants in common, and parceners may make Joint te-  
 tenant in leases for life, or years, of their own parts and purparties at their tenants.  
 common, pleasures, and these leases will bind their companions. And one Tenants in  
 F.N.B. 62. coparcener, or tenant in common, may make a lease of his part to common.  
 G. his companion if he will (2).

If a feoffment be made upon condition, and before the time of performance of the condition, the feoffor and feoffee do join to make a lease for life or years of the land; this is a good lease.

Bro. Leases \* A man that hath an estate in land to him and his wife, and his \* P. 269.  
 58. heirs, may make what lease he will of the land, and this will be good against all men but his wife only, and that for her time (3).

Co. 10. 49. If there be lessor in fee, and lessee for ten years; in this case, they two may join together and make a lease for lives, or for any term of years; and this is good.

Plow. 133. A disseisee cannot make a lease of that land whereof he is disseised, until he make his entry, or recover the possession of the land again. So neither can a woman that hath recovered the third part of her husband's land in a writ of dower, make any lease of it before she be in possession by execution. And yet if a lease be made to me for years, I may make a lease of part, or an assignment of all the term, before I have made my entry into the land demised. So if the father die, and the son make a lease to a stranger of the land descended to him before his entry; this is a good lease: but if a stranger had entred and abated into the land, and then the son had made the lease, *contra*.

Co. 5. 5. In some cases also such persons as are not seised in fee simple, By special  
 Dier 357. &c. nor able to derive such estates for life or years out of their power or  
 Co. 6. 2. own estates, may lawfully notwithstanding make such leases for proviso to  
 870. 1. 175. life, &c. And this is sometimes by some special act of Parliament make leases.  
 See in leases made by tenant in tail enabling them so to do. And hence it is also that a tenant in tail may make leases for three lives or twenty one years. And sometimes it is by some special power or authority that is given or reserved by and to the party himself, that had the fee simple in him, or given to some other to do it in his name; and leases thus made, may be good. And therefore if any Act of Parliament enable a

(1) In 3 Burr. 1806. it is said to have been long settled.—“That an infant may make a lease without rent to try his title.”—See also Co. Lit. 308. a. 1 Roll. Abr. 729. See further as to leases by infants, the disagreements of the books, respecting them, discussed, and the authorities relating thereto, in Bac. Abr. leases (B.) leases by Guardian. ibid. (I. 9.)—Vin. Abr. Infant (B.)—By the stat. 29 Geo. 2. c. 31. Infants, lunatics, and females covert, may apply to the Courts of Chancery, or Exchequer; or to the Courts of Equity of the counties palatine of Chester, Lancaster, and Durham; or to the Courts of Great Session of Wales; by petition or motion, in a summary way; and by the order of those courts respectively, such persons may by deed only, without levying a fine, surrender leases for lives or years, and take new leases for lives or years of the premises comprised therein.

(2) If joint tenants join in a lease, this shall be but one lease; for they have but one freehold;—but if tenants in common join in a lease, it shall be several leases of their several interests,—2 Roll. Abr. 64.—Com. Dig. Estates (G. 6.)—See more amply in Bac. Abr. Leases (I. 5.)

(3) If a man is possessed of a beneficial lease for a term of years in right of his wife as executrix to her former husband, he may grant and convey the same.—Thrustout v. Coppin. 2 Will. Rep. 277.



tenant in tail, or a tenant for life, to make leases for three lives, or twenty one years; leases that are so made in pursuit of that authority, are good. And if a man be seised of land in fee, and convey it to the use of himself for life, or in tail, with divers remainders over, with a proviso that it shall be lawful for him, or any such tenant in tail, to make leases for twenty-one years; in this case he, or they, may make such leases, and they will be good. But in both these cases care must be had to pursue the authority strictly, *i. e.* that the leases made be according to the power and direction given by the statute or proviso; for if it differ and vary ever so little from the sense and meaning of the same, the lease will not be good. And therefore in the case before of a power to make leases for twenty-one years, if the party make more leases for twenty-one years at one time than one, they are all void but the first; because it is against the intent of the parties, though it be not against the words (1). And so if the power be to make leases for three lives; he cannot by this make a lease for ninety-nine years if three lives so long live. But if the power be thus, provided, *&c.* that he may make any lease in \* possession or reversion, so as it doth not exceed the number of three lives or twenty-one years; in this case a lease may be made for ninety-nine years if three lives live so long. But where uses are raised by way of covenant, and in the deed there is a proviso, that the covenantor for divers good considerations may make leases for years; in this case, this power is void, and therefore no lease can be made hereupon: neither will any averment help in this case. And if a man have letter of attorney, or other authority to make leases for another, and he doth make them accordingly; such leases are good. But herein also caution must be had of three things: 1. That the authority be good. 2. That he that is the deputy or attorney do pursue the authority strictly. 3. That he do it in the name of his master, and not in his own name (2).

Averment.

2. In respect of the manner of the agreement, and the words whereby the same is set down: and what words will make an estate for life or years. Livery of seisin.

A lease made for a thousand days, months, or weeks, is as good, for so long as it endureth, as a lease for an hundred or a thousand years. So a lease for half a year, or a whole year, is good. So if a lease be made from day to day, or from week to week, for four years; this is good lease for four years, *et sic*

(1) The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the statute of uses. The *intent* of parties who gave the power, ought to govern every construction. He to whom it is given, has a right to enjoy the full exercise of it: they over whose estate it is given, have a right to say "it shall not be exceeded." The conditions shall not be evaded; it shall be *strictly pursued*, in form and substance: and all acts done under a special authority, *not agreeable* thereto, nor warranted thereby, must be *void*.—Of all kinds of powers, the most frequent is that "to make leases." For the encouragement of farmers, to occupy, stock, and improve the land, it is necessary they should have some *permanent* interest. Unless the owner of the estate for life was enabled to make a *permanent* lease, he could not enjoy to the best advantage, *during* his own time: and they who came *after*, must suffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full and ample enjoyment, *per* *Ld. Mansfield* 1 *Burr.* 120.—If a man hath power to lease for ten years and he leaseth for twenty years; the lease for twenty years shall be good for ten years of the twenty, in equity.—1 *Chan. Ca.* 23.—See more amply how a power to make leases shall be expounded. *Com. Dig.* *Poiar.* (B.)—*Bac.* *Abr. Leases* (l. 10. and 11.)—*Denn v. Fearnside* 1 *Wils. Rep.* pt. 1. p. 176.—*Fearne on Cont. Rem.* 3d edit. 90.

(2) See accordingly, and further in 1 *Wood* 684.—A lease made by an attorney in his own name, and the covenants to pay the rent are void.—*Frontin v. Small*, 2 *Ld. Raym.* 1419.—*S. C.* 3 *ir.* 705.

Plow. 227. *de similibus*. So if one make a lease for ten years, and so from ten years to ten years, during an hundred years, or until an an hundred years are incurred; this is a good lease for an hundred years. So if one make a lease from three years to three years, during the life of *I. S.* in this case if livery of seisin be not given, this is a good lease for six years; but if livery be given, it is a good lease for the life of *I. S.* (1). And if a lease be made from my death until *anno Domini* 1650; this is a good lease.

Co. 6. 26. If I say to *I. S.* being in my house [here *I. S.* I demise to you my house and land so long as I live;] this is a good lease for life to him, if livery of seisin be made. *Et sic de similibus*.

24 Aff. pl. If one make me a lease of land until an hundred pounds be paid me, and make livery of seisin upon it; this is a good lease for life, determinable upon the payment of the hundred pounds. But, if no livery be made, it is no good lease.

Bro. Leases 27. 51. If one make a lease to me for my life, and for four, ten, or twenty years after; this is a good lease for life first, if livery of seisin be made, and then a good lease for years, for so many years as are agreed upon afterwards, which my executors shall have. And if no livery of seisin be made, yet it seems it is a good lease for so many years after my death.

Co. 1. 155. If an indenture of lease be made between *A.* of the one part, and *B. C.* and *D.* of the other part, and therein *A.* doth demise land to *B.* to have and to hold to him for eighty years, *B.* shall live so long, and if he die, or alien the premises within the term, then that his estate shall cease, and then the lessor doth grant the land to *C.* for so many years of the said term as shall be then to come after \* the death or alienation of *B.* if he live so long; in this case this is a good lease to *B.* for so many years as he shall live of the eighty years; but the lease to *C.* after is not good, for the term is ended by the death of *B.* but if the words of the second demise be, to have and to hold during the residue of the eighty years, and not during the residue of the term; in this case the second demise is good to *C.* also. *see p. 163 Wright's leading case Simon 782*

Co. 1. 155. If one make me a lease for sixty years if I live so long; provided that if I die within the term, that my executors shall have it during the residue of the sixty years; in this case, this is a good lease for the sixty years determinable upon my death, but not a good lease for the residue of the sixty years after my death. And yet it may amount to a good covenant for that time.

Evan's case Trin. 5 Jac. B. R. If *A.* covenant to levy a fine to *B.* and his heirs; provided that if he pay to *B.* and his heirs ten pounds at the end of thirteen years, that then the fine shall be to the use of *A.* and his heirs; and *A.* doth covenant with *B.* by the same deed, that *B.* his heirs, executors, and assigns, shall quietly hold the premises from *Michaelmas* next for thirteen years, and yearly from thenceforth for ever, if the ten pounds be not paid according to the intent; in this case, this covenant doth not make a good lease for the thirteen years, and it is but a covenant.

(1) Lease for one year, and so for two or three years, or any further term of years as lessor and lessee shall think fit and agree, after the expiration of the said term of one year, this is a good lease for two years, and a ter every subsequent year begun, is not determinable till that be ended. — *1 Wilf. Rep.* pt. 1. p. 262.

If one make a lease for a certain number of years, and it is further agreed that upon some contingent the lessee shall have the fee simple, and livery of seisin is given hereupon; in this case, the lease for years doth continue good for the time agreed upon.

A lease for years cannot by the agreement of the parties be made to the heirs of the lessee, nor intailed to the heirs of his body. And therefore if a lease be made to *I. S.* and his heirs, or to *I. S.* and the heirs male of his body; yet the executors of *I. S.* and not his heirs, shall have it, and the executors may sell the term.

Executors.

If two agree by word, that one of them shall have such a piece of land for twenty years; this is a good and perfect lease that is made by this agreement, albeit they do agree to have a writing made of it afterwards; for in this case the writing is but the confirmation of it. But if the agreement be, that such a writing shall be made, or that a lease shall be made of such a thing between them and put in writing, so that the agreement hath reference to the writing, and implieth an intent not to perfect the agreement until the writing be made; in this case, the lease is not a perfect lease until the writing be made.

Albeit the most usual and proper making of a lease is by the words, demise, grant, and to ferme let, and with an *Habendum* for life or years, yet a lease may be made by other words; for whatsoever word will amount to a grant will amount to a lease (1). And \* therefore a lease may be made by the word, give, betake, or the like. The word *Locavit* also is a good word.

And the use in the exchequer is to make leases by the word *committimus*, which is a good word to make a lease. And if *A.* do but grant and covenant with *B.* that *B.* shall enjoy such a piece of land for twenty years; this is a good lease for twenty years (2). \* So if *A.* promise to *B.* to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. \* So if *A.* licence *B.* to enjoy such a piece of land for twenty years; this is a good lease for twenty years (3). And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not done at such a time, that the feoffor, &c. shall re-enter, to the end that in this case the feoffor, &c. may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the incertainty of the time (whereunto care must be had) do not make it void. And therefore if *A.* bargain and sell his land to *B.* on condition to re-enter if he pay him an hundred pounds; and *B.* doth covenant with *A.* that he will not take the profits until default of payment, or that *A.* shall take the profits until default of payment; in this case, howbeit this may

(1) See before in page 230, and notes 3 and 4 thereto.

(2) It is said to be a general rule that the word covenant will make a lease, tho' the word grant be omitted, and much more when the words are to hold, enjoy, &c. *Gilb. L. of Covenants* 26. 2 *Med.* 80.— See further in *Cro. Jac.* 659. *Cro. Car.* 207.—*Hob.* 35.—3 *Bull.* 252.

(3) And may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a licence for years and traversed, the lessee may give the licence in evidence to prove it.—*Bac. Abr.* Leases (K).

be

Co. 5. 1.  
super Lit.  
28.  
Plow. 150  
197.

Co. super  
Lit. 45.  
Co. 1. 155

Co. super  
Lit. 45.  
Plow. 83.  
524.  
Co. 6. 35.  
1. 155.

Plow. 270.

Hil. 16. Jac.  
in the Ex-  
chequer.

(1) See m  
Fin. Abr. 1  
(2) Or w  
—If I. S. n  
So it is of a



be a good covenant, yet it is no good lease. And if the mortgage covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this case albeit the time be certain, yet this is no good lease, but a covenant only. If one give a bond for the quiet holding of a close for three years; it seems this is no lease in law. See the opinion of the Parliament for *bonds and covenants* both, *stat. 14. Eliz. cap. 11. (1).*

A lease for years may begin at a day to come, as at *Michaelmas* next; or three or ten years after, or after the death of the lessor or of *I. S.* and it is as good as where it doth begin presently. But a lease for life of any thing whatsoever, whether it lye in livery or in grant, if it be *in esse* before, cannot begin at a day to come. And therefore if a lease be made, *Habendum* from *Michaelmas* next, or from the day of the making of it, or after the death of the lessor, or after the death of *I. S.* to the lessee for life; this lease is not good: but in case of a lease of land made thus, it is sometimes holpen by the livery of seisin. For which see *livery of seisin, chap. 9. numb. 11.* But all leases for years, whether they begin *in presenti*, or *in futuro*, must be certain, that is, they must have a certain beginning, and certain ending, and so the continuance of the term must be certain, otherwise they are not good. And yet if the years be certain, when the lease is to take effect in interest or possession, it is sufficient; for until that time it may depend upon an uncertainty, *viz.* upon a \* possible contingent precedent before it begin in possession or interest, or upon a limitation or condition subsequent: but in case when it is to be reduced to a certainty upon a contingent precedent, the contingent must happen in the lives of the parties. And albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it is sufficient: *Id certum est quod certum reddi potest.* As for examples, if *A.* seised of lands in fee, grant to *B.* that when *B.* shall pay to *A.* twenty shillings, that from thenceforth he shall hold the land for twenty-one years, and after *B.* doth pay the twenty shillings; in this case, *B.* shall have a good lease for twenty-one years from thenceforth (2). And if *A.* grant to *B.* that if his tenant for life shall die, that *B.* shall have the land for ten years; this is a good lease. And if one make a lease for years after the death of *C.* if *C.* die within ten years; this is a good lease if *C.* die within the ten years, otherwise not. But if *A.* be seised of land in fee, and lease it to *B.* for ten years, and it is agreed between them that *B.* shall pay to *A.* an hundred pounds at the end of the said ten years, and that if he do so and shall pay the said hundred pounds, and an hundred pounds at the end of every ten years, that then the said *B.* shall have a perpetual demise and grant of the premisses from ten years to ten years, continually following, *extra memoriam hominum, &c.* in this case, this, albeit it be a good lease for the first ten years, yet it is void for all the rest for uncertainty. And if a lease be made to begin

3 In respect of the commencement, and continuance, and end of the term or estate. Incertainty.

\* P. 273.

Co. 5. 1.  
super Lit.  
28.  
Plow. 156.  
197.

Co. super  
Lit. 45.  
Co. 1. 155.

Co. super  
Lit. 45.  
Plow. 83.  
524.  
Co. 6. 35.  
1. 155.

Plow. 270.

Hil. 16. Jac.  
in the Ex-  
chequer.

(1) See more fully, by what words leases may be made, — *Co. Lit. 45. b. 301. b.* — *1 Wood 370.* — *Fin. Abr. Estates. (T. a.) (X. a.)*

(2) Or where a man makes a lease from the feast of *St. Michael* for so many years as *I. S.* shall name. — If *I. S.* name a certain term (in the life of the lessor) it is then a good lease by matter *ex post facto*. So it is of all leases which are to commence on a condition precedent. — *6 Co. 35. b.*

from

from the Nativity of Christ, and he doth not say which nativity, as next, &c. it is void for uncertainty. And yet if a lease for years be made of land in lease for life, to have and to hold from the death of the tenant for life; this is a good lease: so if it be, to have and to hold from *Michaelmas* next after the death of the tenant for life, or from *Michaelmas* next after the determination of the estate of the tenant for life; these are good leases. So if there be a former lease in being for life or years, and another lease for years is made of the land, to have and to hold from the end of the former estate by surrender, forfeiture, or otherwise, for twenty years; or to have and to hold from the surrender, forfeiture, or other determination of the former lease, if there be any, and if there be none, for twenty years; these and such like leases are good, and this commencement is certain enough. And if one make a lease to begin after the death of *I. S.* and to continue until *Michaelmas*, which shall be in *anno Domini* 1650; this is a good lease.

If a man have a lease of land for an hundred years, and he make a lease of this land to another, to have and to hold to him for forty years to begin after his death; this is a good lease for the whole forty years, if there shall be so many of the hundred years to come at the time of the death of the lessor. But if the lessor grant the land to another, to have and to hold to him for and during all the residue of the term of an hundred years that shall be to come at the time of the death of the grantor; this is void for uncertainty. And yet if in this case he grant all his estate, or all his term, or all his interest in the premises of the deed, and then say, to have and to hold the land, &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death; by this the whole estate and interest of the grantor in the land doth pass presently by these words in the premises of the deed. And if in this case the lessor for an hundred years make a lease of the land, to have and to hold after his death for an hundred years; this will be a good lease for as many of the first hundred years as shall be to come at the time of his death.

If *A.* make a lease to *B.* for ninety years to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others; and afterward makes another lease of the land, *Habendum* after the determination or redemption of the former lease; it seems this is a good lease and certain enough. But if a lease be made to *A.* for eighty years if he live so long, and if he die within the said term or alien the premises, that then his estate shall cease; and then he doth further by the same deed grant and let the premises for so many years as shall then remain unexpired after the death of *A.* or alienation to *B.* for the residue of the said term of eighty years, if he shall live so long; in this case, the lease to *B.* is void; for after the death of *A.* the term is at end; but if he say for the residue of the eighty years, it is otherwise.

If *A.* doth make a lease of land to *B.* for so many years as *B.* hath in the manor of *Dale*, and *B.* hath then a lease for ten years of the manor of *Dale*; in this case, this is a good lease for ten years. But if *A.* make a lease of land to *B.* for so many years as the land *B.* hath in execution shall be in execution; this lease

\* P. 274.

*Doc v Poliquen*  
confess seems to  
be bad. H. B. 11.  
535

See p. 250

*Tenant for ten years*  
grants a lease for  
20 years & after  
assigns the fee he  
is stopped from  
avoiding the lease  
1 Salk. 275  
*Gillman v Moore*  
11 Mod. 358  
Bac. Ab. 4. 192.

*Doc. Pater 3 H. 13*  
where if *A.* tenant  
for life of *B.* make  
a lease for years; on  
the death of *B.* he may  
comp. & avoid the lease  
to *C.*

See p. 260.

Co. super  
Lit. 45.  
Plow. 27

Co. 6. 35.  
14 H. 8. 10  
Plow. 274.

Plow. 27.  
Co. 6. 35.

Co. super  
Lit. 46.  
10 Ed. 3. 26.

(1) In wh  
737 Fin. Ab  
rences in the  
fect to their  
Diz. Estates

is void for uncertainty. And if a lease be made during the minority of *I. S.* or until *I. S.* shall come to the age of twenty one years, these are good leases; and if *I. S.* die before he come to his full age, the lease is ended. But if a lease be made to another until a child that is now in its mother's belly shall come to the age of twenty-one years; this lease is not good. And if a lease be made for so many years as *I. S.* shall name; in this case, if *I. S.* do name a certain number of years in the life time of the party lessor, this is a good lease. But if a lease be made for so many years, as the executor of the lessor, or of the lessee shall name; this lease is void.

Co super  
Lit. 45.  
Plow. 27.

If a man make a lease for twenty one years, if *I. S.* live so long; or if the coverture between *I. S.* and *D. S.* shall so long continue; or if *I. S.* shall continue to be Parson of *Dale* so long; these and such like leases are good. But if *A.* make a lease to *B.* for so many years as *A.* \* and *B.* or either of them shall live, not naming any certain number of years; this cannot be a good lease for years. So if the Parson of *Dale* make a lease of his glebe for so many years as he shall be Parson there; this is not certain, neither can it be made so by any means. And yet if a Parson shall make a lease from three years to three years so long as he shall be Parson; this is a good lease for six years if he continue Parson so long, and for the residue void for uncertainty. So if I make another a lease of land until he be promoted to a benefice; this is no good lease for years, but void for uncertainty (1).

\* P. 275.

Co. 6. 35.  
14 H. 8. 10.  
Plow. 274.

If I have a rent charge of twenty pounds *per annum*, and let it to another until he have levied an hundred pounds; this is a good lease for five years. But if I have a piece of land of the value of twenty pounds *per annum*, and I make a lease of it to another until he shall levy out of the profits thereof an hundred pounds; this is no good lease for years, but void for uncertainty.

Plow. 27.  
Co. 6. 35.

But here note in all these cases of uncertain leases made with such limitations as aforesaid, as until such a thing be done, or so long as such a thing continue, &c. that if livery of seisin be made upon them, they may be good leases for life determinable on these contingents, albeit they be no good leases for years.

Note.

Co. super  
Lit. 46.  
10 Ed. 3. 26.

And in some special cases a lease may be good notwithstanding some uncertainty in the continuance of it, for a lease may cease for a time and revive again, as if tenant in tail make a lease for years reserving twenty shillings, and after take a wife and die without issue; in this case, as to him in reversion the lease is merely void, but if he indow the wife of the tenant in tail of the land, as to the wife it is revived again. So if tenant in tail make a lease for years rendering rent, and die without issue, his wife enquirent with a son, and he in reversion enter, in this case as against him the lease is void, but after the son is born the lease is good again if it be within the statute. So if tenant in fee simple take a wife, and then make a lease for years and dieth, the wife is in-

(1) In what cases leases shall be void for uncertainty. See 1 *Mod.* 180.—1 *Str.* 651.—1 *Ld. Raym.* 737. *Vin. Abr.* Estate (Y. a.)—As to the commencement of a lease, *ante* in page 105, and the references in the note thereto; and more amply as to the certainty requisite in leases for years, with respect to their beginning, continuance, and ending, in 2 *Bl. Com.* 143.—*Bac. Abr.* Leases (L.)—*Com. Dig.* Estates (G. 8).



dowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again.

4. In respect of another lease then in being of the same thing.

If a lease be made for life, or years, to *A.* and after the lessor doth make a lease for years by word, or in writing, to *B.* regularly this concurrent lease to *B.* is a good lease at least for so many years of the second lease as shall be to come after the first lease is determined according to the agreement; as if the first lease to *A.* be for twenty years, and the second lease to *B.* be for thirty years, and both begin at one time; in this case, the second lease is good for the last ten years (1). And yet the reversion will not pass without the attornment of the tenant, and therefore if any rent be reserved on the first lease, the second lessee shall not have it until the first lessee doth attorn. But if the second lease be for the same or for a less time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years to begin at the same time; these second leases are for the most part void. And yet herein a difference is taken between leases made by matter of record and by writing, and leases that are made by word of mouth: for if the second lease be made by fine, deed indented, or poll, albeit it be but for the same or for a lesser time, and albeit it be a lease of the land itself, and not of the reversion, yet it will pass the rent reserved upon the first lease if the first lessee attorn, and so also it will do without attornment where attornment is not needful. But if the second lease be made by word of mouth it is otherwise, for a reversion and a rent in this case will not pass without deed, and therefore a grant by word doth not pass them. And if the second lease be by fine or deed indented, then also it will work by way of estoppel both against the lessor and against the lessee, so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it; and if there be any rent reserved upon the second lease, the lessee must pay it from the time of the making of the lease (2). And therefore if one make a lease of land to *A.* for ten years, and after make a lease to *B.* of the same land from Michaelmas next for ten years, and before Michaelmas the first lessee doth purchase the fee-simple, so that now by this means his term is drowned; in this case, the second lease shall begin at Michaelmas. So if one make a lease to *A.* for twenty years, and *A.* make a lease of the land to *B.* for two years rendering rent, and after *A.* makes a lease for the rest of his time to *C.* by deed; this lease, if the lessee for two years do attorn, is a good lease of the rent and reversion; and so it is also without attornment, if there be any consideration given for it, for then it is also a good lease for all the rest of the

Estoppel.

(1) See the case of *Davison* on demise of *Bromley v. Stanley*. 4. Burr. 2210. The question in that case was "whether an acceptance of a second lease operated as a surrender of the former lease." And it was agreed that the acceptance of a second good lease will operate as a surrender of a former. But the reason does not hold, in the case of accepting a new void lease, or one that the lessee cannot enjoy. (2) Estoppels ought to be mutual, otherwise neither party is bound by them; therefore if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme, by reason of their disability to contract are not estopped; therefore neither shall the lessee be estopped, because all estoppels ought to be mutual.—*Cre. Elis.* 37. 371.—For the rules respecting estoppels see *Co. Lit.* 352. a.—and more amply as to leases for years by estoppel, how far, and against whom, such leases are good, in *Bac. Abr.* Leases (O).

\* *Bac. v. Muddif. Off. h. O. last 50.* in a lease made by the lessor to the lessee, the lessee takes all the interest under the lease which is proper to be given him.

*Lecherwood v. Holburne*  
3. March 1840. 392

term

(1) For the either one or leases (B.)

term after the two years. So if one make a lease to *A.* for twenty years, if he live so long, rendring rent, and after he doth make a lease to *B.* by indenture for eighty years to begin presently, or grant the reversion to begin at a day past, or the like; in all these cases, if the first lessee attorn the rent will pass, but if not, it will be a good lease of the land for so many of the years as shall be to come after the first lease ended. But if the second lease be by parol without a deed, the reversion, as a reversion, will not pass, and the grant will be void if there be nothing else to help it. And in cases where the second lease is void, albeit the first lessee surrender his estate, or his estate end by a condition; yet the second lease is not hereby made good. But if the second lease for years after another lease for life, or years, be made for money, so as it may be said to pass \* by way of bargain and sale; this may help the matter, for in this case, albeit it be by word only, it may pass the reversion and the rent also: but in most cases it is good for the remainder of the term after the first lease ended. And if the second lease be to begin after the end of the former lease; in this case, the former lease is no impediment at all to the validity of the latter lease, but the latter lease is good notwithstanding.

Any person whatsoever of full age, that hath any estate of inheritance in fee tail in his own right, of any lands, tenements, or hereditaments, may at this day without fine or recovery make leases of such lands for lives, or years, and such leases shall be good, so as these conditions and incidents following, be therein observed and kept.

1. Such leases must be by deed indented, and not by deed poll, or by parol.

2. They must be made to begin from the day of the making thereof, or from the making thereof. And therefore a lease made to begin from *Michaelmas* which shall be three years after, for twenty-one years; or a lease made to begin after the death of the tenant in tail, for twenty one years, is not good. But if a lease be made for twenty years to begin at *Michaelmas* next; it seems this is a good lease.

3. If there be an old lease in being of the land, the same must be surrendered, or expired and ended within a year of the time of the making of the new lease; and this surrender must be absolute and not conditional; also it must be real, and not illusory, or in shew only. For *factum non dicitur quod non perseverat*.

4. There must not be a double or concurrent lease in being at one time, as if a lease for years be made according to the statute; he in the reversion cannot afterwards expulse the lessee and make a lease for life or lives, or another lease for years according to the statute, nor *à converso*. But if a lease for years be made to one, and afterwards a lease for life is made to another, and a letter of attorney is made to give livery of seisin upon the lease for life, and before the livery made the first lease is surrendered; in this case, the second lease is good.

5. These leases must not exceed three lives, or twenty-one years from the time of the making of them (1). And there-

\* What leases or other acts, may be made or done by a tenant in tail: and what leases made by such a tenant shall be good to bind the issue, or him in remainder, or others after the death of the tenant in tail: and how they shall bind.

\* P. 277.

(1) For the words of the statute are, to make a lease for three lives, or twenty-one years, so that either one or the other may be made, but not both.—*Co. Lit. 44. b.*—See further *Bac. Abr. Leases (E.) Rule 4.*

for if tenant in tail make a lease for twenty-two or for forty years, or for four lives; this lease is void, and that not only for the overplus of time more than three lives or twenty-one years, but for that time of three lives or twenty-one years also. And it hath been resolved, that if tenant in tail make a lease for ninety-nine years determinable upon three lives; that this is not a good lease. But if a lease be made by a tenant in tail for a lesser time, as for two lives, or for twenty years, this is a good lease. And if

\* P. 278.

6. These leases must be of lands, tenements, or hereditaments Co. 5. 2. manurable or corporeal, which are necessary to be let, and whereout a rent by law may be issuing and reserved. And therefore if a tenant in tail make a lease of such a thing as doth lie in grant, as an advowson, fair, market, franchise, or the like, out of Tallentine's case, Pasch. 3 Jac. B. R. Co. 11. 60. Trin. 2 Jac. B. R. Adjudged Dodding's case. which a rent cannot be reserved, especially if it be a lease for life; this lease is void, and that albeit the thing have been anciently and accustomably let. And a grant of a rent-charge therefore out of such lands is void. And if tenant in tail make a lease for three lives of a portion of tithes rendring rent; this lease is unquestionably void. And so also it seems it is if it be a lease for twenty-one years (1).

7. They must be of such lands, or tenements, which have been most commonly let to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made, so as if it have been let for eleven years, at one or several times within twenty years before the new lease made, it is sufficient. And albeit the letting have been by copy of court roll only, yet such a letting in fee, for life, or years, is a sufficient letting, and so also is a letting at will by the common law. But these lettings to farm must be made by such as are seised of an estate of inheritance, for if it have been only by guardian in chivalry, tenant by the courtesy, in dower, or the like; this will not serve to be a letting within the intent of the statute. Co. 6. 37. Dier 271.

8. There must be reserved upon such leases yearly during the same leases, due and payable to the lessor and his heirs to whom the reversion shall appertain, so much yearly farm or rent, or more, as hath been most accustomably yielded or paid for the lands, &c. within twenty years next before such lease made. And therefore if the rent be reserved but for part of the time of the new lease, this lease is void. And if the tenant in tail have twenty acres of land that have been accustomably let, and he make a lease of these twenty acres, and of one acre more which hath not been accustomably let, reserving the usual yearly rent, and so much more as to exceed the value of the other acre; this is not a good lease by the statute. So if the tenant in tail of two farms, the one at twenty pounds rent, the other at ten pounds rent, and he make a lease of both Co. 5. 8. 6. 6. 37.

(1) This distinction is no longer of any importance; for the 5th Geo. 3. c. 17. makes leases of incorporeal hereditaments by ecclesiastical persons, as good as if the leases were of corporeal hereditaments, whether such leases are for lives or years; and gives action of debt to the successor for rent, which in case of a freehold lease) he could not have brought at the common law. See further in note 3 to 1st edit. Co. Lit. 44. b.

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Trin. 1.  
Jac. B.  
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Co. 3. 51.

Co. 7. 7.  
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these farms together, at thirty pounds rent; this is not a good lease within the statute. But if besides the annual rent there have been formerly reserved things not annual, as heriots, fines, or other profit upon the death of the farmers, or profit out of another's soil, as pasturage for a colt, &c. if upon the new lease the yearly rent be reserved, albeit these \* collateral reservations be omitted, yet these leases are good. And so also if there be more rent reserved upon the new lease than the rent that hath been anciently paid, the lease is good notwithstanding. And yet if tenant in tail of land let a part of it that hath been accustomedly let, and reserve the rent *pro rata*, or more than after the rate; this is not a good lease. And yet if two coparceners have twenty acres of land of equal value between them in tail, and these have been usually let, and they make partition of these lands, so as each of them hath ten acres; in this case they may make leases of their several parts, reserving the half of the accustomed rent. And if upon the old lease the rent were payable at four days in the year, and by the new lease it is reserved to be paid at one day; this is not a good lease. But if the rent upon the old lease be payable in gold, and the new rent be payable in silver; it seems the lease is not good. \* P. 279.

And yet if two coparceners have twenty acres of land of equal value between them in tail, and these have been usually let, and they make partition of these lands, so as each of them hath ten acres; in this case they may make leases of their several parts, reserving the half of the accustomed rent. And if upon the old lease the rent were payable at four days in the year, and by the new lease it is reserved to be paid at one day; this is not a good lease. But if the rent upon the old lease be payable in gold, and the new rent be payable in silver; it seems the lease is not good. And if a tenant in tail be of a manor, that hath been usually demised for ten pounds rent, and after a tenancy escheat, and then he doth make a lease of the manor, rendering ten pounds rent by the year; in this case, this is a good lease; but if the lessor purchase a tenancy, then it seems it is otherwise.

9. Such leases must not be without impeachment of waste. And therefore if tenant in tail make a lease of his land intailed without impeachment of waste; this lease is void. And if a lease be made for life, the remainder for life, &c. this is not a good lease; for in this case, during the remainders, the tenant for life cannot be punished for waste done. But if such a tenant of land make a lease of it to *I. S.* for the lives of three others; this is a good lease, albeit it may afterwards become an occupancy (1).

10. Such leases must not be against any special Act of Parliament. And therefore if a woman that is tenant in tail of the gift of her deceased husband, or of any of his ancestors, while she is sole, or after with another husband, make any such lease warranted by this statute; yet this lease is not good.

11. They must have all due ceremonies and circumstances for the perfection of them, as other such like leases have, as livery of seisin, and the like, where they are needful. And then only when leases have these conditions, and are made according to these provisions, are they said to be within this statute of 32 H. 8. and such only as do bind the tenant in tail himself, and the issue in tail; for otherwise if it be not warranted by this statute, albeit it will bind the tenant in tail himself that made it, yet it will not bind his issue; but as to him it will be void, or voidable at the least: for if tenant in tail of land make a lease of it for

(1) The learned author of the commentary, in the 2d vol. p. 319. mentions these *nine* requisites, as necessary to be observed in leases by tenants in tail,—husbands seized in right of their wives,—and persons seized in fee-simple in right of their churches;—and adds, these are the guards, imposed by the statute 32 H. 8. c. 28. (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence given by that statute.

an hundred years without any rent reserved thereupon; this lease as to the issue in tail is void: but if he make a lease of his land for an

\* P. 280. hundred years \* rendering rent, and have issue and die; in this case the lease is only voidable by the issue at his pleasure; and therefore if the issue accept the rent after the death of the tenant in tail, by this means the lease is affirmed and become good. But howsoever the lease be made, it will not bind him that comes in of a remainder over, nor him that is the donor. And therefore if a tenant in tail make a lease warranted by the statute, and after die without issue, so that the land doth remain over to another, or revert to the donor; in these cases neither he in the remainder, nor the donor shall be bound by this lease, for as to them the lease is void. And yet by a common recovery the tenant in tail may make leases of, or lay charges upon the land to bind the donor and him in remainder also. But otherwise it is of a fine; for if tenant in tail make a lease for years by fine, this will not bar the donor, nor the remainder in any case where it is in a stranger. And yet if the remainder be in the tenant in tail himself, and he make a lease for years by deed according to the statute or by fine; this lease is good, and shall bind his own remainder (1).

6. What leases, or other acts, may be made or done by the husband with the land he hath in fee-simple, or fee tail in the right of his wife, or jointly with her: and what leases made by him of such lands are good: or not: and how.

The husband may at this day without fine or recovery make leases of the lands, tenements, or hereditaments, whereof he hath any estate of inheritance in fee simple, or fee tail, in the right of his wife, or jointly with his wife, made before or after the coverture; so as there be in such leases observed the eleven conditions or limitations before required in the leases made by tenant in tail; and so that the wife do join in the same deed, and be made party thereunto, and do seal and deliver the same deed herself in person. For if a man and his wife make a letter of attorney to another to deliver the lease upon the land; this lease is not a good lease from the wife warranted by the statute. And yet then as in other like cases of leases not warranted by this statute, it is a good lease against the husband. And when the lease is such a lease as is warranted by the statute, it doth bind the husband and wife both, and the heirs of the wife; but if it be an estate tail, it doth not bind the donor nor him in remainder.

If the husband and wife at the common law had joined in a lease of her land without rendring of rent; this lease had been void as against the wife, and so is the law still.

If the husband at the common law had been seised of land in the right of his wife, and he had made a lease for years rendring rent and died; this lease had been void, and so is the law still.

If the husband and wife at the common law had made a lease by word rendring rent; this lease had been void as against the wife; and so is the law still.

\* P. 281. \* The husband and wife together may by fine, or recovery, make what leases they will of her land, or charge it for what time they will; and such leases and charges will be good

(1) See accordingly verbatim in 1 Wood 686-7.—as to the doctrine of leases by tenant in tail, see *Bar. Abr.* Leases (D) under the three following heads.—1st. What leases tenant in tail might have made by the common law.—2d. What leases he may now make to bind his issue since the statute of 38 H. 8. c. 28.—3d. In what cases the issue in tail or strangers shall be bound by voidable leases made by tenant in tail.—and further in *Vin. Abr.* Estate (I, a, 2.)—*Com. Dig.* Estates (B. 32).

against the husband and wife both and their heirs also. But if the husband alone do levy any fine of his wife's land, and thereby make any estate whatsoever; this will not bind the wife after her husband's death, but she may avoid it (1). And if the husband and wife make a lease of her land rendring rent to them and the heirs of the wife; (as in such leases it ought to be;) in this case, the husband cannot by fine or otherwise, grant or discharge this rent longer than during coverture, unless the wife join in the fine, but the rent shall descend, remain or revert, in such sort and manner as the land should have done (2)

Co. super  
Lit. 44.  
Co. 5. 14.  
11. 66.

Bishops with the confirmation of the Dean and Chapter, Parsons or Vicars with the consent of their Patrons and Ordinaries, Archdeacons, Prebends, and such as are in the nature of Prebends, as Precentors, Chaunters, Treasurers, Chancellors, and such like, also Masters and Governors and Fellows of any colleges or houses, (by what name soever called) Deans and Chapters, Masters or Guardians of any hospital and their brethren, or any other body politic, spiritual and ecclesiastical (*Concurrentibus his quæ in jure requiruntur*) might by the ancient common law have made leases for lives or years, or any other estates of their spiritual or ecclesiastical living for any time without tint or limitation. And at this day the Bishops, and the rest of the said spiritual persons, except Parsons and Vicars, may make leases of their spiritual livings for three lives, or twenty-one years, and such leases will be good both against themselves and their successors. But such persons may not make leases or estates for any longer time than for three lives or twenty-one years, and if they do, albeit it be by fine or recovery, or it be confirmed by the Dean and Chapter, &c. yet it is void as against the successor. Neither will the leases made by such persons for three lives or twenty-one years be good, unless they have certain conditions and properties required in them. These things therefore are necessarily required to be observed in the making of such leases: 1. That they have the effect of all the qualities or properties before mentioned and required by the statute of 32 H. 8. in the lease made by the tenant in tail, and be made after that pattern, viz. That they be by deed indented. 2. That they do begin from the time of the making of them. 3. and 4. That the old lease be surrendered, and there be not a concurrent lease (save in case of a Bishop). And therefore if any such person make a lease for twenty-one years to one, and then make a lease for three lives to another; this second lease is void. And yet if a Bishop make a lease for twenty-one years to one man, and then within a year after make another lease to another for twenty-one years to begin from the making of it, this, so as it be confirmed by Dean and Chapter is resolved to be a good lease. 5 That they do not exceed three lives or twenty-one years, but they may be for a less time. 6. That they be of lands or tenements manurable or corporeal. 7. That they be made of lands

7. What leases, or other acts, Bishops, or other spiritual or ecclesiastical persons, may make or do with the lands they have in the right of their churches or houses: and what leases made by such persons will bind their successors and others: or not.

\* P. 282.

Co. super  
Lit. 44.  
Co. 11. 66.  
5. 3. 15.

(1) Lease made by baron of lands in right of his wife is not absolutely void on baron's death, but voidable only by the entry of the feme.—See *Jordan v. Wikes*, Cro. Jac. 332.—Hob. 5  
(2) See more amply as to leases by husband and wife by the common law or by stat. 32 H. 8. in *Bac. Abr. Leases* (C).—*Com. Dig.* Baron and Feme (G. 3.)—1 *Wood* 688.—Note 2 to 13th edit. *Co. Lit.* 44. a.—and *Vin. Abr.* Baron and Feme (E. a. 10.)

that



that have been commonly let to farm by the space of twenty years before. 8. That there be reserved upon them the ancient and accustomed rent payable to the lessor and his successors during the time (1). 9. That they be not made without impeachment of waste. 10. That there be livery of seisin upon them, &c. where it is requisite. 11. If the lease be made according to the exception of the statute of 1 Eliz. and 13 Eliz. and not warranted by the statute of 32 H. 8. as in the case of a concurrent lease, and it be made by a Bishop, or any sole corporation, it must be confirmed by the Deans and Chapters, or others, that have interest. And if a Parson, or Vicar, make a lease, it is not good but during the Parson or Vicars residence according to the statute of 13 Eliz. chap. 20. and in this case there needs no confirmation at all (2). 12. Some of the leases that are made by the colleges and houses of the university, &c. must have some rent-corn reserved upon them. But Bishops, Deans, Parsons, and such like spiritual persons cannot grant the next advowsons of churches, neither can they grant rents out of their spiritual livings, but the same charges will be void after their death. And if a Bishop suffer an annuity to be recovered against him by a pretence of title of prescription, on a judgment after a verdict or confession; or a Parson in such a case pray in aid of the patron, and so suffer an annuity to be recovered; this will not bind the successor. And yet a Bishop, or any such spiritual person, may grant ancient offices of trust, of necessity, or conveniency, as the offices of chancellor, register, steward, bailiff, or the like, with the ancient fees incident thereunto, for the life or lives of the grantees; and such grants are good, albeit they be made by the Bishops of the new erected bishopricks, and that there be not in them the conditions and properties required in the leases before mentioned, so as they be confirmed by the Dean and Chapter. But they may not grant any new office, nor yet add any new fee to the old offices. And therefore if a Bishop grant an annuity *pro consilio impenso & impendendo* where none was before; this will not bind the successor. And yet if there be an old fee, and there is a new fee added to it; in this case it seems it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwise than they have been granted. And therefore where the ancient grants of the office have been to one, it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of these offices be longer than for the life or lives of the grantees. And in case where the grant is void, the confirmation of the Dean and Chapter will not make it good (3).

Note.

But here note, that albeit in all these cases of leases and grants, not warranted by the statutes afore said, the statutes say the leases

(1) Lease by bishop, and more than the old rent reserved, held good by *North C. J. Wyndham and Atkins*—but the case was argued when *Vaughan* was C. J. and he and *Ellis* were of a different opinion. See the case of *Threadneedle v. Lynham*, 2 Mod. 57.

(2) By the stat. 22 Car. 2. c. 11. § 75.—Intituled “an additional act for rebuilding the city of London, &c.” *Parsons* and *Vicars* in London were impowered to lease their glebe for forty years with the consent of the patron and ordinary—See fully as to leases by *Parsons* and *Vicars*, in *Bac. Abr. Leases* (F).

(3) As to the grant of offices, see before in page 238. and the books referred to in note 2. thereto.

shall

Stat. 13  
cap. 20.Co. super  
Lit. 55. 5  
270.  
14 H. 8.Co. super  
Lit. 45.  
3. 59. 65.  
7. 8.(1) See  
Co. Lit. 45.  
(2) See  
11 and 14.  
Leases for li  
Abr. Leases(3) If la  
this is a lea  
the old opin  
but if the o  
any time co  
evidence by  
shall be to  
(4) See f  
c. 8.)—Com

shall be void; yet this is to be understood as against the successors, and not against the lessors themselves; for the leases are good so long as the lessors live, or at least so long as they continue in the place. And therefore if such a lease be made by a Dean and Chapter, or other corporation aggregate; it is good as against the Dean or other head of the corporation, so long as he doth continue in his place (1). And if a Bishop make any lease or other grant, nor warranted by the statute of 1 *Eliz.* or a Dean and Chapter, Master and Fellows of a College, or the like, make leases not warranted by the statute of 13 *Eliz. cap. 10.* these leases are good against themselves, albeit they are void against their successors. So as if a private Act of Parliament doth entail land upon a man, and appoint him what estates he shall make, and that if he make any other estates they shall be void; in this case, they shall not be void as to the tenant in tail himself that doth make them.

Stat. 13 *El. cap. 20.* Leases of benefices with cure are no longer good than the Parson is resident.

Leases made by Colleges must have reserved upon them the third part of the rent in corn. See the statute of 18 *Eliz. cap. 20.* (2)

Co. super Lit. 55. 56. 270. 14 H. 8. 12. If one make a lease to another, during the will and pleasure of him that letteth, or him that taketh, or both (for so in effect is every lease at will;) this is a good lease at will (3). So if one make a feoffment in fee, or lease for life, &c. and doth not make livery of seisin and so perfect the estate; the feoffee or lessee hath only an estate at will. But if a bargain and sale be made of land, and the same is void; or a corporation grant land, and the grant is void; by this there is no lease at will made (4).

Co. super Lit. 45. 3. 59. 65. 7. 8. Leases for lives, or years, are of three natures; some be good in law, some be voidable by entry, and some void without entry. And of such as be good in law, some be good at the common law, as leases made by tenant in fee-simple notwithstanding they be for longer time than three lives or twenty-one years; some by Act of Parliament, as leases made by tenant in tail; leases made by a Bishop seized in fee in the right of his church, alone, without the Chapter: leases made by a man seized in fee-simple or fee tail of land in the right of his wife, together with his wife, for twenty-one years, or three lives according to the statutes. And of such leases as be void also, some are void at the common law; and that sometimes *in presenti*, as in the cases before of leases for years that have no certainty in them, or leases for lives made without livery of \* seisin, and the like. And some are void \* P. 284.

(1) See the case of *Lloyd v. Gregory*, *Cro. Car.* 502. and the observation thereon in note 4 to 13th edit. *Co. Lit.* 45. a

(2) See the observations made on the restrictive statutes of 1 *Eliz. c. 19.* 13 *Eliz. c. 10.* 14 *Eliz. c. 11.* and 14. 18 *Eliz. c. 11.* and 43 *Eliz. c. 29.* in 2 *Bl. Com.* 321.—and further as to the doctrine of leases for lives or years by ecclesiastical persons, in *Vin. Abr.* Estate (R. a 6.) Confirmation (E.) *Bac. Abr.* Leases (E)—*Com. Dig.* Estates (G. 5).

(3) If land be leased to A. for a year, and so from year to year as long as both parties shall agree; this is a lease for two years certain; and if the lessee hold on after two years, he is not lessee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract: but if the original contract were only for a year, or if it were at 8*l. per annum* rent without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unless there were some evidence by a regular payment of rent annually or half yearly, that the intent of the parties was that he should be tenant for a year. *Buller's Intr. to law of nisi prius.* 2 edit. 84.

(4) See further as to the doctrine of estates at will, 2 *Bl. Com.* 145.—*Vin. Abr.* Estate (S. b.) to (C. c. 8.)—*Com. Dig.* Estates (H).

in *futuro*, as if a tenant in tail make a lease for years warranted, or not warranted, by the statute, and after die without issue; this lease is void as to him in reversion or remainder: *Cessante statu primitivo cessat derivativus*. So if a Prebend, Parson, or Vicar make a lease for years not warranted by the statutes; this is void by the death of the lessor, and the successor need not make any entry or claim to avoid it (1). So if a tenant for life make a lease for years, and after die; in this case the lease for years is void.

Acceptance. And therefore in all these, and such like cases, no acceptance of rent after will affirm such leases. But otherwise it is in cases of leases for years made by Bishops, albeit they be confirmed by Dean and Chapter; and of leases made by Deans and Chapters, or tenants in tail; as to their successors and issues, when the leases are not warranted by the statutes: and otherwise it is also in the case of leases for life, made by these or any of the former lessors; for in all cases of lease for life it must be avoided by entry, &c. and therefore such leases are not void but voidable, *viz* the leases of Bishops and Deans after their death by their successors, and that by the statute law; and the leases of tenants in tail by their issues

Acceptance. after their death, and that by the common law. And in these, and such like cases, the acceptance of the rent by the issue or successor will make good the lease, at least for their time.

If a lease be made for years on condition that upon such a con- Co. 3. 65.  
tingent it shall be void; in this case, as soon as the thing doth happen, the lease is void *ipso facto* without any re-entry, &c. But if a lease for life be made on such a condition; in this case, the lessor must enter, &c. before the lease will be void.

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(1) As to void or voidable leases by ecclesiastical persons, see *Bac. Abr.* Leases (H).



## C H A P. XV.

## Of a Feoffment, Gift, Grant, and Lease.

**A** Feoffment, gift, grant, or lease in writing, may become void by rasure, interlining, and the like, as hath been shewed before in deed, *supra* (1). And a feoffment, gift, grant, or lease, and the estate thereby made, may become void by forfeiture, or upon a breach of a condition, or by a limitation. For which see *condition* (2) and *uses*. Also they may become void by disagreement or refusal: and this may be either by the disagreement of the party himself to whom it is made, or by the disagreement of another: of the party himself; for no estate can be made to a man of any thing in fee simple, for \* life, or otherwise, against his will: and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void: by the disagreement of another; as the husband, in case of a feoffment &c. made to his wife, may by disagreement avoid it. And for the first of these the law is thus, that all such acts as give estates directly or by way of use are good at first; and the thing granted, when the deed of grant is delivered to his use, shall vest in the grantee, before he hath notice of the grant, or agree to accept of the thing granted; so that if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or lease, or goods or chattles be given or granted to a man; in these cases, the things granted shall be said to be in the grantee, and the grant good, before notice and agreement, until disagreement. And before agreement the grantee may waive it, and so avoid the estate, and the deed also whereby the estate is made. And if it be but a lease for years that is made; he may waive and avoid that by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his use. But if it be an estate of freehold that is made by feoffment &c. it seems he cannot waive and avoid that but in a Court of Record.

When the cause of a grant faileth and the thing granted is executory, the grant is become void. As if one grant an annuity for an acre of land, for tithes, or for counsel; in this case *pro* is conditional, and therefore if the land be evicted by an elder title, or the grantee disturbed in the tithes, or he refuse to give counsel, the annuity is determined. But if a feoffment, or lease for life, or years, be made of an acre of land *pro una acra* &c. as in the case before; albeit the acre be evicted, &c. yet the grant in this case of the acre of land is good. And if one grant an annuity for counsel; if the grantee will not give counsel, the grant is not of force. So if one grant to make new pales in a place for the old pales; if in this case he cannot have the old pales, it seems the grant shall not bind him to make new pales. So if one grant a rent for a way; stop the way, and the rent shall be stopped.

1. Where and by what means a feoffment, gift, grant, or lease, and the estate thereby made, being good at first, becometh void by matter *ex post facto*, and may be avoided: or not: and how.

\* P. 285.

*but when he discovers it such was in him*

*ie. if A made a feoffment to B for years then to C and if C is given to B, C may disclaim and avoid his estate but this will not affect B's term given to A. As his heir to the use of B & his heir, B disclaims the use shall be to the grantor. — In consequence to A in the such use as B shall obtain, then A disclaim the use shall be to the grantor. — In this Palmed case.*

(1) See before in page 66.

(2) See before in page 151.

*In the Palmed case the said used to the use of himself for life and to his heirs for life then to his heirs successively. He committed treason & the use should not be executed.*

H

If one that hath a lease for life or years, of the manor to which an advowson is appendant, grant the next avoidance that shall happen during the lease, or grant a rent out of the manor, and then surrender the manor so that his estate is gone; in this case notwithstanding, the grant of the next avoidance, and of the rent, doth continue good; and the grantee shall enjoy it according to the grant, as long as the estate that is surrendered should have had continuance.

If the heir of the King's tenant enter and make a lease before livery sued, and after an intrusion is found against him; by this it seems the lease is avoided. So if tenant in tail make a lease warranted by the statute, and after dieth without issue; by this the lease is determined (1).

- P. 287. • If a tenant in tail make a feoffment to his heir within age, and he, after he is of full age, make a lease for years of the land, and after the tenant in tail dieth, and the heir is remitted; the lease in this case is not avoided. Co. super Lit. 349.

If an annuity be granted to one until he be advanced to a benefice by the grantor, and the grantor die, and the heir or executor of the grantor tender a benefice; it seems this will not determine the grant. Plow. 472. 15 H. 7. 1.

If *A.* be lessee for years of an advowson, and grant the next avoidance to *B.* if it shall happen to become void during the term, and *A.* doth surrender the term to *C.* who hath the inheritance, and the church become void before the end of the term; in this case, the grant is good to *B.* and he shall have the next avoidance, for a man cannot derogate from his own grant. So if *A.* be lessee for years, and he grant a rent-charge to a stranger, and after surrender his term to the lessor; in this case, albeit the term be extinct, yet the rent doth continue, and the stranger shall have it during the term. So if *A.* have a rent-charge out of the land of *B.* and acknowledge a statute to *C.* and then release the rent to *B.* in this case, albeit the rent be gone as to *A.* and *B.* yet it is in *esse* as to the conusee, and he may extend it. Co. 8. 145. 7. 39.

If a man be seised of a great wood, and grant to *I. S.* six hundred cords of wood out of the same wood, to be taken by the assignment of *A.* in this case, if *A.* will not upon request assign where the wood shall be taken, yet the deed will not lose its effect, but *I. S.* may take it without assignment. Co. 5. 24.

If *A.* be lessee for life on condition to have fee, and he make a lease to *B.* for years and after he perform the condition, and so his estate for life is turned into a fee simple; in this case, the lease for years is good still notwithstanding: but otherwise it is in case of the King. Co. 7. 14.

If *A.* tenant in tail enfeoff *B.* on condition to the use of *A.* in fee, and *A.* had granted a rent charge or acknowledged a statute, which by the statute of 1 R. 3. cap. 5. was extended, and after *A.* had performed the condition; in this case, albeit the estate had been charged, yet the interest of the grantee or conusee had continued. Co. 1. 147. 148. 11 H. 7. 21.

If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *A.* in fee, and *A.* doth grant a rent-charge or acknowledge a statute and die; in this case and hereby, the 5 Ed. 4. 2. Pethoufe & Cranes case. Mic. 36. 37 El. Co. B.

(1) See accordingly before in page 278.

grant is not become void; but if *B.* die without issue, the heir of *A.* shall be charged.

Davis Rep. 1. If a corody be granted for a service to be done, the omission of the service doth determine the corody.

20 E. 4 ult. If one grant lands with his daughter in frank-marriage, or goods with his daughter in marriage, and after the marriage is dissolved, and \* they are divorced; in this case the grant is now become of \* P. 287. no force: *Cessante causa cessat effectus.*

Bro. Grant. 103. If one man grant to another an office of charge only, to which there is no benefit or fee incident; in this case, he may avoid and determine his own grant at his pleasure, without any cause given. But if there be any fee or profit incident to the office, then he may not avoid the grant of it, or put out the officer, without some cause of forfeiture: and if he do the grantee may have an assise. And yet in this case also he may put him out of the office, albeit he may not deprive him of the fee or profit incident thereunto.

2. Where a man may avoid his own grant: or not: and when.

Bro. Grant. If one grant a ward to another to marry, or for his service; it seems he may not afterwards avoid this grant. But if one grant him to another for instruction or education, *contra.*

Bro. Grant. 128. If one make a lease for years of his land rendring rent, and after grant the rent to *I. S.* and the termor attorn, and after the lessor accept of a surrender of the estate of the termor; yet this doth not avoid the grant of the rent, but the same shall continue still.

Lit. Sect. 477. If a disseisor grant a rent, common, or other profit apprender out of the land, and after the disseisee doth enter and infeoff him of the land; in this case, the rent is avoided, and the common is gone. But if the disseisee release to the disseisor; in this case, he shall not avoid his own grant.

An infant, and other disabled persons, may impeach and avoid their own grants in divers cases, which see before in *grant* (1).

A deed of feoffment &c. in some cases is holpen, and a fault therein cured, by the making of livery of seisin. For which see *feoffment and lease*. But an attornment will not help the grant of a reversion, &c. for it is a maxim in law, that attornment cannot make a void grant good.

3. Where and by what means a feoffment, gift, grant or lease, or the estate thereby made, being void or voidable at the first, may become good by matter *ex post facto*: or not.

Co. 1. Ca. pel's case. Dier 373. Co. 1. 48. 76. If a tenant in tail make a lease for life, or years, of land, and this lease is voidable, and after the tenant in tail doth suffer a common recovery of the land, to whomsoever it be; by this the lease is affirmed and made good during the term, as well against the issues and heirs by the entail, as against him in reversion or remainder: and so it is of a charge of a rent upon the land. And if tenant in tail make a lease of the land or charge it, and after levy a fine of the land to a stranger, by this the lease or charge is become good against the issue in tail also (2).

So held in the Exchequer Hil. 16 Jac. If a tenant in tail make a lease for forty years rendring rent, and die, and his issue doth lease to another by indenture for twenty-one years rendring rent, to begin after the expiration,

(1) See before in pages 7. 24. 231. 232. and the notes and references thereto.

(2) See accordingly the case of *Beck*, on demise of *Hawkins v. Welsh*, in 1 *Will. Rep.* pt. 1. p. 276. where the court resolved, that if tenant in tail makes a lease or mortgage for years, or charges the land with any other incumbrances, and afterwards suffers a common recovery, that shall let in all the incumbrances: and the reason is, that whatever act binds the tenant in tail himself, shall bind the recoverors, or the person or persons to whose use the recovery is suffered; for he who recovereth cannot say that he against whom he recovered had but an estate in tail.

forfeiture,



forfeiture, or surrender of the first lease; it is said this doth affirm the first lease. *Sed quære.*

Acceptance of rent reserved on a lease for life or years, which is voidable only and not void, may make the lease good (1).

- \* P. 288. \* A feoffment, gift, &c. that is made by duress or menace, and therefore voidable, may by another deed of defeasance, afterwards made between the same parties, become good. Bro. Defea-  
sance 17.

Also grants, leases, and the estates thereby made that are not good, may be made good and perfected by release or confirmation. For which see *release* and *confirmation*.

4. Where and when a feoffment, gift, grant, or lease may be good for one time, and void for another, and good against one person but void against another; and good in part: and void in part: or not. Co. super  
Lit. 46. 7. 8.
- A feoffment may be good against some persons, and void against others, but cannot cease and revive and be good and void at several times; as a lease for years, or a grant of rent, &c. may in many cases; for a grant may be suspended, and a lease for years may cease and revive again: as if tenant in tail make a lease for years, rendering twenty shillings rent, and after taketh a wife and dieth without issue, and he in reversion or remainder endoweth his wife (as he may;) in this case, the lease, as against the woman, is revived, albeit it be void as to him in reversion or remainder. So if tenant in tail make a lease for years and die without issue, his wife encent with a son, and he in reversion enter, and after the son (being heir to the entail) is born; in this case, the lease which was before avoided by him in reversion, if it be such a lease as is warranted by the statute, is good against the issue in tail, and therefore is revived again. So if the King make a gift in tail to *W.* to hold by Knights service, and *W.* doth make a lease to *A.* for thirty years reserving rent, and then *W.* dieth, his son and heir of full age; in this case, as to the King, this lease is void, but after livery sued out, the lessee may enter again; and if the issue accept the rent, the lease is affirmed. So if tenant in tail make a lease not warranted by the statute and die, and his heir is in ward; in this case, the guardian in the behalf of the heir may avoid the lease during the wardship: but afterwards the heir may affirm it again, if he accepts of the rent. So if tenant in fee-simple take a wife, and then make a lease for years and dieth, and the wife is endowed, she shall avoid the lease for her estate, but after her death the lease will be in force again. But if the patron grant the next avoidance, and after the Parson, Patron and Ordinary, before the statutes, had made a lease of the glebe for years, and after the Parson had died, and the grantee of the next avoidance had presented a Clerk to the church, who had been admitted, instituted, and inducted, and had died within the term, and the Patron had presented a new Clerk to the church, who had been admitted, instituted, and inducted: in this case the lease had not revived again. No more than if a feme covert levy a fine alone, and the husband doth enter and avoid the fine, the estate shall revive against the wife after his death; for it is avoided as to her also as well as to the husband by his entry. See more in *Deed supra cap. 4. numb. 7.*

- \* P. 289. \* cases it may be avoided by the party himself that made it,

(1) See accordingly *Rickman v. Garth*, Cro. Jac. 173. *Pennant's case*, 3 Co. 65.—and further as to affirmation by acceptance of rent in *Cqm. Dig. Condition (P.) Nelf. Abr. Tit. Acceptance (A).*

Co. super  
Lit. 45.  
Co. 7. 8.  
Dier 337.  
239.

and not by others, albeit they be privies, as heirs, executors, or administrators; and in some cases it is voidable by others, and not by the party himself; and in some cases it is voidable by the party himself and by others. And in some cases it is voidable only at some times; and in some cases it is voidable at all times: as for examples, an infant, if he grant by fine, must avoid it during his minority if he live to be of full age, otherwise he himself or any other shall never avoid it (1). But if he grant by deed, this may be avoided at any time by himself, his heirs, executors, or administrators, or his guardian in his right, as the case is. But a lord by escheat cannot avoid a voidable estate made by his tenant being an infant. And if a woman covert do any such act by deed; it may be avoided by her husband during the coverture, or herself after the coverture, or her heirs, &c. that are privies after her death. And if a man *non sanæ memoriæ* do any such act, it may be avoided by himself that is the party denying it, but it may be avoided by his heirs, &c. that are privies. And if tenant in tail make a voidable lease not warranted by the statute, he may not avoid it himself, but his issue may. And if he be ward by reason of a tenure in *capite* or knight service, the guardian of the issue, during his time, may avoid it. And if a corporation spiritual, sole or aggregate, make leases not warranted by the statutes, they may not avoid it themselves, but their successors after their death, translation, or other remotion, may avoid it; or if a Bishop make such a voidable lease, the King, when the Bishoprick doth come into his hands, may avoid it.

5. Who may avoid a feoffment, gift, grant, or lease, that is voidable: or not: and how.  
Infant.  
Woman covert.  
Non sanæ memoriæ.  
Tenant in tail.  
Corporations.

Co. super  
Lit. 7, 8.

And now we pass to another sort of assurances, that are for some special purposes, and in some special cases only; wherein we shall first begin with an *Exchange*.

(1) See before in the chapter on fines, p. 7. and note 1 thereto.

## C H A P. XVI.

## Of an Exchange.

1. Exchange  
or exchange.  
*Quid.*

*There must be  
more than two  
parties 3. Wils.*

**A**N Exchange is the mutual grant of equal interests, the one in exchange for the other. Or it is, where a man is seised or possessed of land in fee-simple, fee-tail, for life, or years, or is possessed of goods, and another is seised or possessed of other lands or possessed of other goods in the like manner, and they do exchange their lands or goods the one for the other. And in this there is a double grant; for each of them doth grant that which is his to the other.

Terms of  
the law ut.  
Exchange.  
Finches ley  
27.

This manner of conveyance (which heretofore was very frequent) (1) is sometimes made by word without any writing; (2) and sometimes it is made by deed or in writing; and which way soever it be made, it must be made by this word exchange; which is a word so \* appropriated to this thing, as the word frank-marriage is to a gift in frank-marriage; neither of which can be made or described by any circumlocution (3).

Co. super  
Lit. 50.  
Perk. Sect.  
253.

**\* P. 290.** The fruit and effect of an exchange is, that it doth give the interest, and alter the property, of the things exchanged, to either party, according to the agreement. And if the exchange be of lands or tenements of any estate of inheritance or freehold, whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it, as a thing made by the word exchange, and *tacite* implied in every grant of exchange; a condition, to give a re-entry upon all the land given in exchange, if he be put out of all or part of the land taken in exchange; and a warranty, to enable him to vouch, and to recover over in value so much of his own land again given in exchange, as shall be recovered from him of the land taken in exchange, if he be sued for it: so that upon every exchange, either party, if he be put out of or lose by action the land he taketh in exchange, hath a double remedy against the other; and yet this remedy doth go only in the privy, and shall not go to an assignee (4). As if *A.* exchange land with *B.* and *B.* be put out of all or part of the land upon a title paramount by a recovery in a real action or otherwise, in this case, *B.* may either enter upon his own land again which he gave in exchange, or else if it be in an action brought, he

Co. 4. 121.  
15 E. 4. 3.  
9 E. 4. 21.  
Bro. Es-  
change in  
toto. Fitz.  
Eschange in  
toto.

(1) This appears from the numerous precedents, inserted in *Madox's Form. Angl.* under the title *exchange*, from page 154 to 173. but though exchanges are not now so frequent, yet precedents of them are properly inserted in the latter authors in the branch of conveyancing.—see 1 *Horfman* 361. 3 *Wood* 243.

(2) Before the statute 29 *Car. 2. c. 3.* for preventing frauds and perjuries.—but now by force of that stat. a writing is made necessary if the exchange is of freeholds, or of terms for years, ~~exceeding three years.~~

(3) See accordingly 2 *Bl. Com.* 323.—1 *Wood* 736.—3 *Wils. Rep.* 491.—Five things are necessary to the perfection of an exchange, 1st. That the *estates* given be *equal*. Secondly, That this *word* (*exambium exchange*) be used, which is to individually requisite as it cannot be supplied by any other word, or described by any circumlocution. Thirdly, That there be an execution by entry or claim in the life of the parties. Fourthly, That if it be of things that lie in grant, it must be *by deed*. Fifthly, If the lands be in several counties, there ought to be a deed *indented*, or if the thing lies in grant, albeit they be in one county, *Co. Lit.* 51. b. *Vin. Abr.* Exchange (A. 2).

(4) Exchange importeth in the law a condition of re-entry, and a warranty voucher, and recompence of the other land that was given in exchange. An assignee cannot re-enter, nor vouch, but *rebut*; exchanger may re-enter upon an assignee. *Noy's Max.* 61.

See Grant  
numb. 4.

Co. super  
Lit. 51.

Item.

Bro. Es-  
change 9.  
Perk. Sect.  
279.

(1) See ac

(2) See no

see

may



may vouch *A.* upon the warranty in law, and shall recover as much in value against him of the land he gave, as he hath lost of the land he took in exchange. But if *B.* alien his land taken in exchange to *C.* and *C.* be put out of all or part of the land upon a title paramount; *C.* in this case, can neither enter upon the land given to *A.* in exchange upon the condition in law, nor vouch *A.* to warranty and recover over in value upon the warranty in law. And yet *A.* in this case shall have the like remedy against *C.* the alienee, upon the condition and warranty both, as he had against *B.* But if *A.* himself implead *C.* for the land he gave to *B.* in exchange, *C.* may make use of this warranty in law by way of rebutter against *A.* Rebutter. And in all these cases where one of the parties is put out of all or part of the land, or out of part of the estate, by entry, and the other party enter upon the others land upon the condition in law, he may enter upon the whole land, and avoid the whole exchange: but if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this case, he shall recover so much in value of the other land only as he hath lost, and no more: as if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a stranger; in this case, he may enter upon the whole three acres he had given in exchange and so avoid the whole exchange if he will. And if *A.* and *B.* be joint-tenants of three acres for life, and the fee-simple to the heirs of *A.* and *A.* exchange this land with *C.* for three acres in fee, and then die, and *B.* enter and \* avoid the exchange for his life (as he may;) in this case, *C.* may avoid the whole exchange, and enter upon his own three acres again. So if he in reversion disseise his tenant for life, and then exchange the land, and after the tenant for life enter; in this case, the other party may defeat the whole exchange. But in this case of an exchange of three acres for three acres, if one of the acres were gained by disseisin, and the disseisee bring an action and doth recover it against the disseisor; in this case, if he vouch over the other party to the exchange, he shall recover so much in value only of the three acres he gave in exchange as the acre he hath lost and no more (1).

*He has his option of re-entry or voucher*

\* P. 291.

To the perfection of an exchange, and to make things to pass by this kind of conveyance, these things are requisite. 1. That the persons or parties thereunto be able to give and take, and not disabled by any special impediment. And for this it must be known, that such persons as may be grantors and grantees may make exchanges, and such persons as are disabled to grant are disabled to make exchanges.

An exchange made between the King and a subject is good, albeit the King hold his land in one capacity and the subject in another.

An exchange made between an infant and another, is not void but voidable only; for the infant at his full age may affirm or avoid it at his election (2).

An exchange made between a tenant in tail and another, is not void but voidable; for it is good against himself during his tail.

3. How an exchange must be made: and what shall be said a good exchange: or not.

1. In respect of the parties thereunto, and their estates.

*If the exchange of the parties Infant, depends on a deed, as in the case of a tenant in tail, it is void.*

Tenant in

life,

See Grant numb. 4.

Co. Super Lit. 51.

Item.

Bro. Exchange 9. Perk. Sect. 279.

(1) See accordingly verbatim in 1 Wood 737.

(2) See note 3 to 13th edit. Co. Lit. 51. b.—and Com. Dig. Infant (B. 3).

*see Parach. 18. Page 4 pl. 7 which seems wrong.*

life, and his issue at his full age may affirm or avoid it at his election.

*Non sane memoriae.*

An exchange made between a man *non sane memoriae* and another, is not void but voidable; for it is good against him, but his heir may avoid or affirm it at his election. Bro. Ef. change 9.

Husband in right of his wife.

A man that doth hold land in fee-simple, fee-tail, or for life in the right of his wife, may exchange this land, and the exchange will be good as long as he and his wife do live. And he with his wife may exchange it for longer time and the exchange is good against him; but his wife after his death may affirm or avoid it if she will. Bro. idem. Perk. sect. 279.

Parson.

One Parson or Vicar may exchange his church or benefice with another, and this exchange is good. Perk. sect. 288.

The disseisor and disseisee may join together and exchange the land whereof the disseisin was made, with a stranger for other land: but if it be made out of the land, and before the entry of the disseisee, it shall not bind the disseisee, for he may avoid it. And a disseisor cannot exchange the land he hath gotten by disseisin with the disseisee for other land; for this exchange is void, unless it be by indenture, or fine, that it may work by way of estoppel. Perk. sect. 280. 273.

Surrender.

The lessor and lessee may join together and exchange the land leased for other land, and this is good: for it shall be said to be the surrender of the lessee to the lessor, and the exchange of the lessor; and therefore the lessee (as it seems) shall have nothing to do with the land taken in exchange. *Sed quare* of that. Perk. sect. 279.

\* P. 292.

Joint-tenants.  
Tenants in common.

Joint-tenants for life, the fee to one of them, may exchange their land with a stranger for other land, to hold in the same nature, and the exchange is good. But joint-tenants, tenants in common, and coparceners cannot exchange the lands they do so hold one with another, before they have made partition. Perk. sect. 277. 281.

If *A* and *B*. be joint-tenants for life, the fee to *A*. and *A*. exchange the whole land with another for other land, this is good only for his moiety as some have said: But it seems notwithstanding it is good for the whole until it be avoided by the other joint-tenant (1). Perk. sect. 277.

2. In respect of the matter whereof it is made, or the nature of the thing exchanged: and of what things and estates an exchange may be made.

The second thing required in a good exchange is, that the things exchanged be such as whereof an exchange may be made. And for this it must be known, that an exchange may be made of things of the same nature, as of a temporal thing for a temporal thing, a spiritual thing for a spiritual, as a house for a house, land for land, a manor for a manor, a church for a church, rent for rent, common for common, a horse for a horse, one piece of plate for another, or the like: or it may be made of things of a divers nature, as of a temporal thing for a spiritual, of a house for land or rent, a chamber in a house for common, or for a reversion, feigniory, or advowson, of land or rent for a right of land or release of right, of an advowson for land, of a rent for a way, of a horse for a piece of plate, of a gown for a horse, or the like. And exchanges made of these things, albeit the things exchanged do lie in divers counties, are good. Also a feigniory by homage and Perk. sect. 263. 261. 262. 266. 258. Lit. sect. 61. Co. super. Lit. 51. 52.

(1) See further when an exchange shall be good, *Com. Dig.* Exchange (A).

Perk. Sect. fealty or the like, which is not valuable, may be exchanged for  
259, 260. land, rent, or any other such like thing. So may a feignory by  
258. divine service. But a feignory in frankalmoigne cannot be ex-  
changed with any but the tenant of the land that doth hold by the  
tenure. And houses, manors, lands, rents, commons, feignories,  
reversions, and the like, may be exchanged in fee-simple, fee-tail,  
for life, or years. So that an exchange may be of an inheritance  
for an inheritance, of a frank-tenement for a frank tenement, and  
of chattels real for chattels real.

Perk. Sect. If one grant white acre in exchange for black acre lying within  
244. the same county, or in two counties, this is a good exchange. So  
Idem. 263. if I grant a rent-charge issuing out of my land in exchange to *I. S.*  
3 E. 4. 10. for an acre of his land, &c. this is a good exchange. So if I have  
9 E. 4. 21. a rent issuing out of the land of *I. S.* and I grant this to *I. K.* in ex-  
Perk. Sect. change for land or other rent; this exchange is good, when the  
262. tenant hath attorned to the grant of the rent. So if one have a  
rent out of my land in fee, and I have the land in fee, and I grant  
the land in exchange for the rent, it seems this is a good exchange.  
But if one grant me a manor or land, and I in exchange for the  
same manor or land, grant unto him a rent *de novo* issuing out of  
the same land or manor, this cannot take effect as an exchange. So

Perk. Sect.  
266. Fitz.  
Exchange

16.  
Perk. Sect.

271.  
Idem.

282.

Idem Sect.  
271.

Perk. Sect.  
269.

Perk. Sect.  
267.

Perk. Sect.  
268, 269.

Perk.  
Sect. 257.

Perk. Sect.  
264, 265.

\* If there be a disseisor and  
disseisee, and the disseisee release his right to the disseisor in ex-  
change for other land; this is a good exchange. <sup>c</sup> So if the dissei-  
sor of an acre of land enfeoff a stranger of the same acre of land,  
and the feoffee give to the disseisee an acre of land in fee, in ex-  
change for a release of all his right in the acre of land of which he  
was disseised; this is a good exchange. <sup>f</sup> But if the disseisee grant  
his right to a stranger that hath nothing in the land in exchange for  
an acre of land; this exchange is not good, neither shall the stran-  
ger take any thing by this grant. <sup>g</sup> If there be Lord and tenant  
by fealty and *12d.* rent, and the Lord exchange the feignory with  
the tenant for the tenancy, or *e converso*, by deed indented; this  
is held by some to be a good exchange. <sup>h</sup> If I have a rent issuing  
out of the land of *I. S.* and I grant or release the same rent to *I. S.*  
in exchange for other land; this is a good exchange. So if I re-  
lease the same rent unto him in exchange for a way over his ground;  
this is a good exchange. <sup>i</sup> If I be seised of lands to which *I. S.*  
hath a right of action, and I give to him other land for a release  
of his right; this is a good exchange. And the same law is of an  
exchange of land, and an advowson, by deed indented, for a re-  
lease of right in another advowson to an usurper, when his incum-  
bent hath been in possession of the church six months. <sup>k</sup> If two  
Parsons of a church make an exchange of their benefices by words  
of exchange, and each of them resign his benefice into the hands of  
the Bishop to the same intent, and the patrons present accordingly,  
and the presentations are *per viam permutationis*; this is a good  
exchange. <sup>l</sup> If three acres of land with an advowson appendant,  
be given in exchange by *T. K.* to *I. S.* for a chamber to be assigned  
by the said *I. S.* at the election of *T. K.* and he assign two cham-  
bers, and *T. K.* choose and enter upon one, and *I. S.* enter

\* P. 293.



upon the land; this exchange is good notwithstanding the uncertainty. So if *I. S.* give his manor of *A* to *T. K.* in exchange for his manor of *B.* or for his manor of *C.* and he enter upon one of these manors, and *T. K.* enter upon the manor of *A.* this exchange is good. Out of all which these things by the way may be observed.

1. That the things exchanged need not to be in *esse* at the time of exchange made; for a man may grant a rent *de novo* out of his land in exchange for a manor. And yet if I grant to another the manor of *A.* for the manor of *B.* which he is to have after his father's death by descent, it seems this exchange is void. 2. There needs no transmutation of possession; for a release of rent, estovers, or right of land for land is good. 3. The things exchanged need not to be of one nature, so as they concern lands or tenements; for land may be exchanged for rent, common, or any other inheritance which doth concern lands or tenements; or spiritual for temporal things, as \* rithes, a tenure by divine service, for land, or a temporal feignory. But annuities, and such like things, which charge the person only, and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land (1).

3. In respect of the manner of the making of the exchange; and where it shall be good without deed or not.

The third thing required in a good exchange is, that it be made in that manner and order that law doth require: wherein these things are to be known. 1. That if all or part of the things whereof the exchange is made do lie in several counties; or if all, or part of the things, whereof the exchange is, be such as lie in grant and not in livery, albeit it be in the same county; in these cases, the exchange must be made by deed indented in writing. But where the exchange is of lands, and of lands lying in the same county, albeit it be of any estate of inheritance or freehold, yet it may be by word of mouth without writing (2). And so also may it be when the things exchanged do lie in divers counties, when the exchange is made only for a term of years. And therefore if an exchange be made between *I. S.* and *T. K.* of lands lying in one and the same county in fee, or for life, it may be by word of mouth: but if all or part of the lands of *I. S.* lie in one county, and all or part of the lands of *T. K.* do lie in another county, the exchange must be made by deed indented. If an exchange be made of rent for land, and the land out of which the rent is issuing, and the land given in exchange for it, do both lie in one county; this exchange cannot be good without deed. So if an exchange be made of the reversion of an acre of land for three shillings of rent issuing out of another acre of land, and both acres are in one county; this exchange must be made by deed indented, or it will not be good. So if an exchange be made of an acre of land, and a rent out of another acre, for another acre of land and common for three beasts, and all is in one and the same county, this exchange must be by deed indented, or it will not be good. But if I be seised of a manor to which I have common appendant or appurtenant, and *T. K.* is seised of another manor to which he hath a villain regar-

(1) Accordingly 1 *Wood* 740.—*Lilly's Conv.* 138.—and see further of what things an exchange may be, in *Vin Abr. Exchange* (D.)

(2) See before *page* 288 *note* 2, as to the stat. 29 *Car. 2. c. 3.* for prevention of frauds and perjuries.

Co. Super  
Lit. 50.  
Perk. Sect.  
265.

Perk. Sect.  
244.  
Co. Super  
Lit. 51, 52.  
Lit. Sect. 62.  
Co. 9. 14.  
Perk. Sect.  
247, 248,  
249, 250.  
246.

Perk.  
249, 250.  
249, 250.

Perk. S.  
265.

19 H. 6.  
Perk. S.  
275.

(1) So  
in the c  
lands ex  
an estate  
equal in  
(2) 'A'  
being ap  
on which  
11. 3. p.  
(3) In

Co. super  
Lit. 50. 51.  
Perk. Sect.  
253, 254.  
9 E. 4. 21.  
Fitz. Ex-  
change 12.

dant, and both the manors are in one county, an exchange may be made of these manors by word of mouth without writing, and the common and villain will pass as incidents well enough. And yet if *I. S.* hath an office whereunto land doth belong, and *T. K.* hath rent issuing out of the land of a stranger, and all the land is in one county, and the office is to be used and occupied in the same county; if these things be exchanged, it must be by deed indented. 2. The word [exchange] or [exchange] must be had and used between the parties in the making of the exchange. As, I grant to you white acre, to have and to hold to you and your heirs in exchange for black acre; and in consideration hereof you grant to me and my heirs black acre in exchange for \* white acre: \* P. 295.

for this word is so individually requisite, as it cannot be supplied by any other word; neither will any averment, that it was in exchange, help in this case (1). And therefore if *A.* by deed indented give to *B.* an acre of land in fee-simple, or for life, and by the same deed *B.* doth give to *A.* another acre of land in the same manner, this cannot enure as an exchange; and therefore if there was no livery of seisin, so as it may take effect by way of grant, it is utterly void. But by this means lands may be granted from one to another, for there needs no livery of seisin. So if an exchange be made by words between two, of lands in one county, and before their entry indentures are made between them of the same lands without words of exchange, and no livery of seisin is made; this shall not pass by way of exchange (2). And yet it hath been held by some that *Permutatio*, or some other word of like effect, may supply this word exchange (3). 3. If any rent, reversion, feigniory, or the like be granted by either party, that then the tenant do attorn to the grant, for attornment is requisite in this case. And yet in the case of the grant of land in possession in exchange, Attornment. no livery of seisin is needful. Neither is it needful that either party to the exchange come to the thing given to him in exchange by the same means and manner of assurance: for if lessee for life of one acre give another acre to his lessor in tail in exchange for a release from him of that acre, to have and to hold in tail in like manner, this is a good exchange. Livery of seisin.

Perk. Sect.  
29. 263.  
29. 276.

Perk. Sect.  
295.

An exchange may be made to take effect in *futuro*, as well as in *presenti*; for if an exchange be made between me and *T. K.* that after the feast of *Easter* *T. K.* shall have my manor of *Dale* in exchange for his manor of *Sale*, this is a good exchange.

19 H. 6. 27.  
Perk. Sect.  
275.

If an exchange be made in writing of land, and it doth limit and express no estate that either party shall have in the thing exchanged, yet this is a good exchange. But if an estate for life be limited expressly to one, and no express estate is limited to the other; this is not a good exchange, as shall be shewed in the next place.

(1) See before in page 288, and note 3 thereto.—In exchanges of land the word *exchange* is necessary in the conveyance, because it imports a special warranty, in respect of the mutual consideration of the lands exchanged: 'tis likewise necessary that the estates of both parties be equal in title, as if one hath an estate in fee, the other must have the like estate; but 'tis not necessary that their estates should be equal in value. 3 *Salk.* 158.

(2) An exchange in the strict legal sense of the word cannot be between three; the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity, on which its operation so entirely depends.—See note 1. to *Co. Lit.* 50. b. 13th edit. and 2 *Will. Rep.* 2. p. 496.

(3) In an exchange of ecclesiastical preferment. See *ante* 291. &c. *post* 295. and note 3 thereto.

4. In respect of the quality or equality of the estates or interests exchanged.

The fourth thing required in a good exchange is equality of estate, *viz.* that either party have the like kind of estate of the thing exchanged; so that if one have an estate in fee-simple, the other have so likewise, and so for other estates. For if the one grant that the other shall have his land in fee-simple for the land which he hath of the other in fee-tail; or that the one shall have in the one land fee-tail, and the other in the other land but for term of life; or that the one shall have in the one land fee-tail general, and the other in the other land fee-tail special; or that the one shall have in the one land for life, and the other in the other

\* P. 296.

land but for years; these exchanges are void and cannot take effect as exchanges. <sup>m</sup> And therefore if the Lord release to his tenant his services in tail in exchange for other lands given to the Lord in exchange in tail also; this exchange is void; for by this release made by the Lord the services are gone for ever. <sup>n</sup> So if tenant for his own life exchange with him that is tenant for life of another; this is not a good exchange. (And by the same reason it should seem, if lessee for twenty years of his land, exchange with another for other land for forty years, that this should not be a good exchange) <sup>o</sup> But if lessee for life be of an acre of land, and he give another acre of land to his lessor in fee-tail in exchange for a release of all his right in the acre that he holdeth for term of his life, to hold to him and the heirs of his body engendred; this is a good exchange. <sup>p</sup> Or if tenant for his own life exchange with him that is tenant in tail after possibility of issue extinct; this exchange is good. <sup>q</sup> And yet if an estate for life be expressed to the one party upon the exchange, and no estate is expressed to the other party; it is said that this exchange is not good; and yet where no estate is expressed, the party shall have an estate for his own life.

Husband and wife. Tenant in tail.

But in these cases it is not necessary that the parties to the exchange be seised of an equal estate at the time of the exchange made; for if tenant in tail or husband in right of his wife exchange their land in fee-simple with another for lands he hath in fee-simple; this is a good exchange, until it be avoided by the issue or the wife. <sup>r</sup> Neither is it necessary that both estates be in possession; for one may grant an acre in possession in exchange for an acre in reversion, and this exchange is good. <sup>s</sup> Neither is it necessary that there be an equality in the value or quantity of the lands exchanged: for if the land of one of the parties be worth one hundred pounds and the land of the other but ten pounds; or if the land of one of the parties be one hundred acres and the land of the other but ten acres; if the estates given be equal, the exchange is good. <sup>t</sup> Neither is equality in the quality or manner of the estate requisite. For if two joint-tenants be in fee of an acre of land, and they grant that acre to another in exchange for other lands, to have and to hold a moiety to one of them and his heirs, and a moiety to the other and his heirs, which is an estate in common; or if two men give lands in exchange to A. and his heirs, for lands from A. to them two and their heirs, albeit the one party hath a joint estate and the other a sole estate, yet the exchange is good. The like law is if the land of one of the parties be of a defeasible title, and the land of the other of an

Fitz. Ex. change 15.  
Lit. Sect. 64, 65.  
Co. super Lit. 50, 51.  
Perk. Sect. 276.

<sup>m</sup> Perk. Sect. 283.  
<sup>n</sup> Perk. Sect. 275.  
Finches ley 27.

<sup>o</sup> Perk. Sect. 276.  
<sup>p</sup> Co. 11.  
<sup>q</sup> Perk. Sect. 275.  
<sup>r</sup> 19 H. 6. 27.

Co. super Lit. 51.  
Perk. Sect. 289.  
Lit. Sect. 65.  
Perk. Sect. 280, 281.  
<sup>s</sup> Idem.  
<sup>t</sup> Idem.

Co. super Lit. 50, 51.  
Co. 1. 98.  
100.  
Perk. Sect. 284, 286.  
292, 289.

Perk. Sect. 258.

Perk. Sect. 282, 256.  
Fitz. Ex. change 1.  
Perk. Sect. 272.

(1) See changes and exchange (2) If some part ought to (3) If their ad English to "their b " Bishop " mentio " &c. " into th " and o " institut " ducted excellent a manner " Mr. V lect. of propriety be clearly -the i



an undefeasible title; this exchange is good till it be avoided (1).

Co. super  
Lit. 50. 51.  
Co. 1. 98.  
102.  
Perk. Sect.  
284. 286.  
292. 289.

\* The fifth and last thing required in a good exchange is, that there be an execution and perfection of the exchange by entry or claim in the life-time of the parties, viz. that both the parties to the same exchange do enter into the things taken in exchange, if they be such things as they may enter into; for until the exchange be executed by entry, or the like, the parties thereunto have no freehold in deed or in law in the things exchanged, albeit the same things do lie in one county: and if either of the parties die before he enter into the lands by him taken in exchange; hereby the whole exchange is become void, if his heir will; but if one of the parties enter, he shall not first begin to avoid the exchange (2). But if the parties enter at any time during their lives it is sufficient, unless the possession be before devested by an elder title, as by entry for a condition broken, entry by a disseisee, or his heir, or the like, and not revested again before the entry. As if an exchange be had between two of land, and before their entry by force of the exchange they are, or one of them is, disseised of the land exchanged, and the disseisor die seised thereof, and then they enter according to the exchange, and put out the heir of the disseisor, this shall not be said to be an execution of the exchange; but if the disseisee have recovered the same land against the heir of the disseisor by writ of entry, and have execution, then he may execute the exchange by entry. And in case where a reversion, rent, or seignior, is granted in exchange, it must be perfected and executed by the attornment of the tenant in the life-time of the parties, otherwise the exchange is not good; but in this case, after attornment is made, it seems the exchange is perfect without any entry or claim.

\* P. 297.  
5. In respect  
of the execution  
of it.

Perk. Sect.  
258.

Perk. Sect.  
252. 256.  
Fitz. Ex-  
change 14.  
Perk. Sect.  
272.

If two Parsons exchange their churches, and resign them into the Bishop's hands, this is not a perfect exchange until they be inducted; and therefore if either of them die before they be both inducted, the exchange is void (3).

Where a deed shall take effect as an exchange, there must be all the conditions before mentioned in the case. And yet note, not.

4 When a  
deed shall  
take effect  
as an ex-  
change or  
not.

(1) See accordingly in 1 Wood 742.—Lilly's Pract. Conv. 139.—and more amply of what estates exchanges may be made, and what estate the parties to the exchange ought to have, in Vin. Abr. Exchange (F.) (G.)—Com. Dig. Estates (A. 2)

(2) If the exchangers do not enter in their lives, the exchange is void, for it must be executed in the same parties that made the exchange. Br. Abr. Exchange pl. 6. See further at what time an exchange ought to be executed, in Vin. Abr. Exchange (K.)

(3) If two Parsons permute their churches, it shall be executed by presentation of their patrons, and their admission, institution, and induction; and until induction the execution is not complete. In the English translation of Perk. Sect. 257. (cited in the margin above) it is said "if two Parsons exchange their benefices, by the word *Permutatio*, and either of them resign his benefice into the hands of the Bishop to the same purpose: and the patrons present them accordingly, and the presentments make mention *per viam permutationis*, this is a good exchange if either of them be inducted living the other, &c."—In Perk. Sect. 288. It is said "if two Parsons exchange their benefices, and resign them into the hands of the ordinary to the same purpose: and the patrons make presentments accordingly, and one of the Parsons is admitted, instituted, and inducted; and the other Parson is admitted and instituted, but dieth before induction; the other Parson shall not keep the benefice in which he is inducted: for the exchange is not perfected, because it is not executed."—These two sections of that excellent book on the laws of England by Mr. Perkins are inserted in Vin. Abr. Exchange (L.) in such a manner, as to impress the readers mind with an idea, that those sections are contradictory to each other.—Mr. Viner's notion seems to have arisen from the word *either* (in the English translation of the 257th sect. of Perkins) being used in two places: but if the word *each* is substituted for the word *either*, as in propriety it ought to be (the word in Perkins being *chescun*) it is presumed the seeming contradiction will be clearly obviated, and the text above supported.—See farther on this point in Gibb. Cod. 868. 2 Co 74.—Bl. 152.—Wood's Inst. 283.—2 Burn's Ecc. Law, Tit. Exchange.

that where one thing is granted for another in the nature of an exchange, and for some of the causes aforesaid, the things cannot pass by way of exchange, there they may pass notwithstanding by way of grant; and the deed may take effect to other purposes, albeit it may not enure and take effect as an exchange. And therefore if two be seised of several acres of land, and the one of them by deed doth give his acre to the other, and the other his acre to him without any word of exchange, and each of them doth make livery of seisin to the other; in this case, albeit the acres will not pass by way of exchange, yet will they pass by way of grant. And in this case if no livery of seisin be made, either of them shall hold the lands granted at will only. And in like manner it is, if two \* agree to exchange land, and after each of them levy a fine, or make a feoffment of the land, to the other; by this the land will pass each to the other, but not by way of exchange. So if *A.* and *B.* his wife, and *C.* and *D.* his wife, agree to exchange lands, and *A.* and *B.* enter into the land they are to have in exchange, and then they do make a feoffment of their own land unto *C.* and his father, and not to *C.* and *D.* his wife; this shall not enure as an exchange, and therefore *C.* and *D.* may enter upon their own land again; but the feoffment is good. And if one assign a woman her dower in exchange for land; this shall not take effect as an exchange, but it shall enure to be a good assignment of dower.

5. How an exchange shall be constituted and taken.

If two do exchange land by deed, and limit no estates, this shall be taken for estates for life, and the exchange is good; but if an express estate be limited to one, and no express estate to the other, it is said this is not good, and that construction of law will not help it. 19 H. 6. 27.  
7 Perk. Sect. 275.

If an exchange be made between two men of two acres of land by deed, and in the *Habendum* it is set down that each of them shall have the acres given in exchange, with divers other acres not expressed in the premises, this addition shall be taken as surplusage, and the exchange shall be good for the two acres. See more in *exposition of deeds*. Perk. Sect. 251.

6. Where an exchange shall be determined, or the nature of it changed by matter *ex post facto*: and how: and where no.

If after an exchange is made, before or after the parties enter, all, or part of the land given to either party be recovered from him upon an elder title, as by an entry upon a condition broken, alienation in mortmain, or upon a disseisin; in these cases if that party enter again upon his own land which he gave in exchange (as he may) hereby the whole exchange is determined (1). But if after the exchange is perfect, one of the parties do enter upon the land he doth give in exchange, this doth not make void the exchange; neither may the other party hereupon enter upon the land he doth give in exchange; but he may have an assize, or an action of trespass against the other. And yet if an exchange be of a common for a way, or a rent, or the like, if the one party deny the common, it hath been said the other party may deny the way or the rent. *Sed quare*. Perk. Sect. 236.  
Co. 4. 122.  
Perk. Sect. 299.  
Bro. Exchange 12.

If an exchange be made between two of a manor, whereof the one half is in tail, and the other half is in fee- Perk. Sect. 299.  
Bro. Exchange 8.  
Perk. Sect. 297.

(1) And if parcel of the estate is defeated, the exchange is as totally and utterly defeated, as if parcel of the land given in exchange were defeated, per cur. *Cro. Eliz.* 502. See further what act or thing will defeat an exchange, in *Vin. Abr. Exchange* (N.)—It is not clear in the law of exchanges, if there is an alienation by one of the parties, and there is an eviction, whether the heir at law or the alienee should enter.—per *Ld. Hardwick* in *Coventry v. Coventry*, 2 *Atk.* 369.

simple,

Bro. Exchange 8.  
Perk. Sect.  
279.

simple, and the tenant in tail that made the exchange die, and his issue disagree to it, so that the exchange of the entailed land is become void; this doth determine the whole exchange: for when an exchange becometh void in part, it becometh void in all; and until it be avoided, it is good for all. As if one be seised of white acre, and he exchange white acre and black acre (which is none of his) with another for two other acres; this shall continue for a good exchange, and not be avoided, until he that hath right to black acre doth evict him that hath it in exchange.

Co. 4. 122.  
Perk. Sect.  
296. 294.  
290. 298.

\* If an exchange be made by tenant in tail, and his issue after his death waive the possession of all or part of the land taken in exchange, and disagree to the exchange, hereby the whole exchange is determined. So if the wife after the husband's death, the infant at his full age, or the heir of him that is *non sanæ memoriæ*, disagree to the exchange of the husband, the infant, or him that is *non sanæ memoriæ*; hereby the whole exchange is determined, and no subsequent agreement can make it good again.

15 E. 4. 3.

If two do make an exchange by word of mouth, and after, before either of them enter, they make indentures of the lands exchanged, and grant the same from one to another; it seems hereby the nature of the exchange is altered, and the exchange determined.

Perk. sect.  
285.  
Co. 1. 105.  
Dier 285.  
Perk. sect.  
290. 294.  
298.  
Co. 1. 98.

The parties themselves, and all privies and strangers for the most part, may take advantage of such exchanges as are void for the defects before named: but when the exchange is only voidable, *contrà*. And therefore when an exchange is made by an infant; the infant himself at his full age, or his heir, and none other, may avoid it. And when an exchange is made by a tenant in tail, the issue in tail after the death of his ancestor, and none other, may avoid it. And when an exchange is made by the husband, or husband and wife, of the wife's land, the wife after the husband's death, or heir of the wife after her death, and none other, may avoid it. And when an exchange is made by a man *non sanæ memoriæ*, his heir after his death, and none other, may avoid it. But in all these cases of infant, tenant in tail, woman covert, and a man *non sanæ memoriæ*, and where lands are recovered by an elder title, the other party may not enter and avoid the exchange, until the infant, issue in tail, woman, or heir of him that is *non sanæ memoriæ*, or him that doth lose the land by an elder title, doth first enter.

7. Who may take advantage of a void or voidable exchange: or not: and when.  
Infant.

Tenant in tail.  
Husband and wife.

*Non sanæ memoriæ*.

8. Where an exchange voidable at first, doth become good by matter *ex post facto*: or not.

Tenant in tail.

Husband and wife.

Co. super  
Lit. 51.  
11 H. 4. 11.  
Perk. Sect.  
290. 294.  
Fitz. Exchange 13.  
Perk. sect.  
291. 279.  
293. 298.

If an infant exchange lands, and after at his full age occupy the lands taken in exchange for his own lands; hereby the exchange is made good. So if tenant in tail exchange his intailed lands with another, and after his death the issue occupy the lands taken in exchange by his ancestor; hereby the exchange is made good for the life of the issue in tail. So if the husband and wife exchange the lands of the wife for other land, and she, after her husband's death, agree to it, and enter into and agree to the lands taken in exchange; hereby the exchange is made good: but if the husband alone make an exchange of his wife's land, and she after his death, agree to this, and enter into the land; it seems this will not make the exchange good. And if a man, seised of land in right of his wife in fee, thereof infeoff a stranger, and take an estate back again to him and his wife, and a third person, in fee, and



and they three join in exchange of the same land in fee for other lands to a stranger in fee, and the exchange is executed, and the husband dieth, and she doth occupy \* the land taken in exchange with the other third person; hereby the exchange is made good. If a man *non sane memoriæ* make an exchange, and his heir, after his death, enter into the land taken by his ancestor, in exchange, and agree to the exchange; hereby the exchange is made good. And in all these cases when the exchange is once by agreement made good, it can never by any subsequent disagreement be afterwards made void.

And now from hence we come to a *surrender*; a special way or means for the giving or transferring of something to another, that hath already some interest in the same thing.

## CHAPTER.

## C H A P. XVII.

## Of a Surrender.

Co. super  
Lit. 337.

A Surrender properly taken, is the yielding or delivering up of lands or tenements, and the estate a man hath therein, unto another that hath a higher and greater estate in the same lands or tenements. But it is sometimes improperly applied to other things. He that doth surrender is called the surrenderor, and he to whom it is made is called the surrenderee.

Co. super  
Lit. 337.  
338.  
Co. 6. 69.  
Plow. 106.  
107. West.  
Symb. 1.  
part. lib. 2.  
cap. 460.

And there be three kinds of surrender, viz. 1. A surrender properly taken at the common law 2. A surrender by custom of lands holden by custom, or of customary estates, whereof we speak not here (1). 3. A surrender improperly taken, as of a deed, or grant of a rent-charge, of a patent, and of land in fee-simple to the King. The surrender properly taken is of two sorts: 1. Express or in deed, which is when it is done by apt words, and the express agreement of the parties. 2. In law or implied, which is when it is wrought by consequence and operation of law; or when the law doth interpret or enure something done to another intent, to make a surrender of it. And in the first case, it is sometimes by word only, and sometimes by writing (2). And when it is by writing, it is said to be an instrument testifying by apt words, that the particular tenant of the lands or tenements for life or years, doth consent and agree, that he which hath the next and immediate remainder or reversion thereof, shall also have the particular estate of the same in possession, and that he yieldeth the same unto him.

Co. super  
Lit. 338.  
Co. 1. 96.  
Bro. surren-  
der 47.  
Perk. Sect.  
591.

The fruit and effect of a surrender is, that it doth pass the estate of the surrenderor to the surrenderee, and that hereupon the estate of the surrenderor is drowned, and extinct in the estate of the surrenderee; and yet not so, but that to some purposes it shall be said to have continuance still. And therefore if tenant for life grant a rent-charge, and after doth surrender his land; in this case, the rent-charge shall continue notwithstanding the surrender. So if lessee for life make a lease for years rendring rent, and the lessee for life surrender his estate; in this case, albeit the primitive estate for life be yielded up, yet the derivative estate

(1) A surrender of copyhold lands (where by a subsequent admittance the grant is to receive its perfection and confirmation,) is, according to my Lord Coke, rather a manifesting of the grantor's intention, than a passing away of any interest in the possession; for till admittance the lord taketh notice of the grantor as tenant, and he shall receive the profits of the land to his own use, and shall discharge all services due to the Lord: but yet the interest is in him only *secundum quid*, and not absolutely; for he cannot pass away the land to another, or make it subject to any other incumbrance than it was subject to at the time of the surrender; neither in the grantee is any manner of interest invested before admittance; for if he enter, he is a trespasser, and punishable in trespass; and if he surrender to the use of another, the surrender is merely void, and by no matter *ex post facto* can be confirmed. Co. Comp. Cap. 87. See further with respect to a surrender of copyhold lands, as part of the general doctrine of copyhold, in Co. Lit. 59. Gilb. Ten. 157. 2 Bl. Com. 147. Wright's Ten. 215. and the title *copyhold* in the several abridgments, &c.

(2) By the statute 29 Ch. 2. c. 3. § 3. no leases, &c. either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, shall be surrendered, unless it be by deed or note in writing, signed by the party surrendering the same or their agents thereunto lawfully authorized by writing, or by act and operation of law. See further in Gilb. Eq. Rep. 256. Vin. Atr. Surrender (L).

## Covenant.

for years shall continue notwithstanding; but the surrenderee shall not have the rent reserved upon the lease for years. So if lessee for life, or years, break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby salved; for the lessor may have an action of covenant still notwithstanding the surrender. And if one seised of land, grant a rent out of it in fee, and this rent is extended on a statute, or granted for less time to another, and then the grantee doth surrender the deed of the grant of the rent to the tenant of the land; in this case, the rent shall continue as to him that hath execution, and to the grantee for the less time. And if one make a lease for years rendring rent, and the lessee surrender his estate to the lessor; hereby the rent is extinct: but if the lessor grant the rent to a stranger before the surrender, *contra*. And if one lease for years, and the lessee let parcel of his term to his lessor rendring rent, and after the lessee surrender his whole estate; in this case, it seems the rent is determined (1).

4. What shall be said a surrender in law of lands; and by what means an estate shall be surrendered in law: or not. By acceptance and taking of a new estate.

If lessee for life, or years, take a new lease of him in reversion, of the same thing in particular contained in the former lease for life or years; this is a surrender in law of the first lease. As if lessee for his own life, or another's life, in possession or reversion, take a new lease for years; or a lessee for forty years takes a new lease for fifty years; the first lease in both these cases is surrendered. And this rule holdeth, albeit the second lease be for a less time than the first, as if lessee for life accept a lease for years, or lessee for twenty years accept a lease for two years. And albeit the second lease be voidable, as being made upon condition, as if lessee for twenty years take a new lease for twenty years, upon condition that if such a thing happen the second lease shall be void, and the thing do after happen; in this case, both these leases are become void: as where the lessor doth grant the reversion to the lessee upon condition, and after, the condition is broken. Or if the second lease be made by tenant in tail, or the like: as if a man make a lease for years of land, and then make a feoffment to another of the land, and then take back an estate to him and his wife of the land, and then make a new lease to the lessee for ten years; this is a surrender in law of the first lease; but if the second lease be merely void, then it is otherwise. And therefore if the lessor do, by words of covenant only, promise to his lessee that he shall have a new lease, and do never actually make it; this is no surrender in law. And this rule as it seems \* holdeth also, albeit the second lease be to the lessee and a stranger, or to the lessee and his wife; and albeit the second lease be by word only, and the first lease be by deed, if so be the thing granted by the lease be such a thing as may pass by word without writing; and albeit the second lease be in another right, as if the husband have a lease for years in the right of his wife, and then take a new lease to him-

*this seems wrong for the surrender cannot be implied unless by the 2<sup>d</sup> time the lessee take all that he covenanted.*  
6 Inst. 85

\* P. 302.

(1) A surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for it is a conveyance at common law, to the perfection of which no other act is requisite, but the bare grant: and though it be true, that every grant is a contract, and there must be *actus contra actum*, or a mutual consent; yet that consent is implied: a gift imports a benefit, and an *assumpsit* to take a benefit may be well presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence, should be the obligee's bond immediately without notice.—*per Cur.* 2 Salk. 618. See the cases there cited in the margin in the 2<sup>d</sup> edition: and more amply as to the nature force and effect of a surrender, in 2 Bl. Com. 325. 7<sup>th</sup> edition. *Fin. Abr.* Surrender (A. 2.) *Wood's Inst.* 284. *Com. Dig.* Surrender (A.)

Palc. 40 E  
Co. super  
L. t. 338.  
Co. 6. 69.  
10. 53. 67.  
5. 11.  
Dier 280.  
Dier 93. 11

Dier 46.  
Co. 2. 60.

Co. 6. 69.  
10. 67.

Perk. Sect.  
635.  
Bro. Sur-  
render 48.  
Trin. 5 Jac

Co. 6. 69.  
Adjudged.

14 H. 8. 15.  
Plow. 194.  
Dier 28.  
Co. 10. 67.

Perk. Sect.  
617.  
Co. 5. 11.

Fitz. sur-  
render 3.  
Co. 12. 18.  
Lit. 218.  
37 H. 6. 17.

Dier 140.  
141.

Dier 272.  
a Dier 178.  
177.  
Co. 5. 54.  
55.

Kelw. 70.  
Dier 140.  
141.

Dier 178.

Trin. 5 Jac  
Sr Jo.  
Chamber-  
lane's ca e.  
See Dier  
200.  
Co. 5. 11.

Per Curiam  
B. R. 9 Jac

See Perk. i  
his chap. o  
Surrender i  
toto. Bro.  
Surrender  
in toto. Fitz  
Surrender  
in toto.  
Co. super  
Lit. 338.

(1) The  
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contract to  
to give up

(2) See a  
285. *Lilly*



self in his own name; and albeit the first lease be to begin presently, and the second be to begin at a day to come, or *à converfo*; and albeit there be a mean estate between, as if land be let to *A.* for years, and after let to *B.* for years, to begin after the first term, and the assignee of *A.* doth take a new lease: So if one demise land for ten years to one, and after demise it for ten years to another, to begin at *Michaelmas*, and after the first lessee accept a new lease. For in all these cases, there is a surrender in law of the first leases. And if there be two lessees for life, or years, and one of them take a new lease for years, this is a surrender of his moiety; whereby it doth appear, that a surrender in law may be made of some estates which cannot be surrendered by a surrender in fait; for *fortior est dispositio legis quam hominis*. And hence it is, that a corporation aggregate may make a surrender in law without deed, although it cannot make an express surrender without deed. But if the lessee do only licence the lessor to make a feoffment, and to give livery of seisin for him; or to give livery of seisin for him as at his attorney; or do licence him to enter into the land and no more; neither of these things shall be said to be a surrender in law. So if the second lease be made of another, and not of the same thing whereof the first lease is made, as where the first lease is of the land, and the second is made of a rent, or other profit to be taken out of the land; or the first is of a manor, and the second of the Bailiwick or Stewardship of the manor; or the first is of a park, and the second is of the keepership of the park; in these cases, there is no surrender of the first lease. Also if the second lease be not a good lease, perhaps it shall not be construed a surrender. See *Co. 2. Lane's case* 17 (1).

But if the first lease be of the land itself, and the second lease is of the vesture of the same land, this is held to be a surrender of the first lease. So if the second lease be not to begin until the first lease end, the taking of this second lease is no surrender of the first lease. So it hath been said, if one make a lease of black acre in *Dale*, and the lessee accept a second lease of all the lands of the lessor in *Dale*, in general words, and the lessor that doth make the lease, have divers other lands there besides this acre, that this is no surrender of the first lease. *Sed quare* of this, for others do much doubt it. So if one enter into land, and make a lease for the trial of the title only; and after the lessor (he and the lessee being both out of possession) \* make another lease of the same thing to the lessee; it seems this is no surrender of the first lease; but if the lessor enter before he make the lease, *contra* (2).

To make a good surrender in deed of lands, and to make them pass by such a surrender, these things are first of all required. 1. That the surrenderor be a person able to grant and make, and the surrenderee a person capable and able to take and receive a surrender, and that they both have such estates

*if it is acting upon the licence which results in a surrender*

\* P. 303.

2. What shall be said a surrender in deed of land; and when they shall be said to pass by such surrender: or not

1. In respect of the persons between whom it is made, and their estate and possession.

(1) The acceptance of a second good lease (as hath been observed before) will operate as a surrender of the former; but the reason doth not hold in the case of accepting a new void lease, or one that the lessee cannot enjoy—There is no inconsistency in the acceptance of a new good lease being a surrender of the former, but the accepting a new void lease cannot shew an intention to surrender the other, for a void contract for a thing that a man can not enjoy, can not in common sense and reason, imply an agreement to give up a former contract—4 *Burr.* 2213.

(2) See accordingly *verbatim*, 1 *Wood* 745. 6.—and further in *Com. Dig.* Surrender (1.) *Wood's Inst.* 285; *Lilly's Prac. Conv.* 282.

as are capable of a surrender. And for this purpose, 1. That the surrenderor have an estate in possession of the thing surrendered at the time of the surrender made, and not a bare right thereunto only. 2. That the surrender be to him that hath the next immediate estate in remainder or reversion, and that there be no intervenient estate coming between. 3. That there be a privity of estate between the surrenderor and the surrenderee. 4. That the surrenderee have a higher and greater estate in the thing surrendered, than the surrenderor hath, so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of his wife, &c. 6. And that he be sole seised of this estate in remainder or reversion, and not in joint tenancy. As for examples, infants, women covert, mad and lunatick men, and all such like persons, as are disabled to grant, are disabled to make a surrender; and none but such as may grant their land, may surrender their land. A corporation aggregate of many cannot make an expresse surrender without a deed, but it may make such a surrender by deed. And such persons as are disabled to take by a grant are disabled to take by a surrender, and such as may be grantees, may be surrenderees; and therefore a surrender made to an

Husband and wife.

infant is good (1). If the husband have a lease or estate for years, in the right of his wife, he alone, or he and his wife together, may surrender this; but if the husband have an estate for life in the right of his wife, being tenant in dower or otherwise, and he alone, or he and she together, surrender this; this surrender is good only during the life of the husband, except it be made by fine.

Executors.

Joint-tenants.

One executor may surrender an estate or lease for years which the executors have in the right of their testator. If there be two joint-tenants and one of them have the particular estate, and the other the fee-simple; as where an estate is limited to two and the heirs of one of them, and he that hath the estate for life doth alien his part to a stranger; in this case, the alienee may surrender to the other joint-tenant: so if there be three joint-tenants for life, and the fee-simple is limited to the heirs of one of them; and one of the joint-tenants for life doth release to the other, and he, to whom this release is made, doth surrender to him that hath the fee-simple; this is a good surrender of a third part. But otherwise one joint-tenant cannot surrender to another joint-tenant, albeit he be tenant for life \* which doth make, and he tenant in fee-simple that doth take the surrender. A lessee for life or years, may surrender to him that is next in remainder in fee-simple, or fee-tail, or to him in reversion in fee, and this is a good surrender; and a surrender, as it seems, may be made to the grantee of the reversion before attornment, so as attornment be afterwards made.

Livery of seisin.

And in case of the surrender of an estate for life, there needs no livery of seisin as in case of the grant of an estate for life. A lessee for years of a term to begin at a day to come, cannot surrender it by an actual surrender before the day the term begin, as he may by a surrender in law. If lessee for life be disseised, or lessee for years be ousted, and before his entry or the getting of the possession again, he surrender his estate to

(1) See accordingly 2 Vent. 201.—*Shew. Parl. Ca.* 151. 3 Lev. 284. S. C.

him in reversion; this surrender is void. So if a woman that hath title of dower surrender it to him in reversion before she hath recovered it; this surrender is void. And yet if lessee for years after his term is begun and before his entry, when no body doth keep from him the profits, do surrender his estate; it seems this is a good surrender; but if another enter before him, and keep him out, it seems otherwise. If there be lessee for years, the remainder for life, the remainder or reversion in fee, and the lessee for years be ousted, and he that ousted him die seised, and then the lessee for years enter, and then the tenant for life surrender to him in remainder or reversion in fee; this is not a good surrender, for there is in this case but a bare right of remainder for life and in fee; but if the lessee for years had not been ousted, it had been a good surrender. If there be lessee for years, the remainder for life, the remainder in fee; the lessee for years may surrender to the lessee for life, and so may the tenant for life to him in remainder or reversion in fee, but if there be tenant for life, the remainder for life, the remainder in fee; in this case, the second tenant for life cannot surrender to him in remainder in fee. If a lease be made for life or years to *A.* the remainder for life to *B.* the remainder in fee tail to *C.* and the first tenant for life or years doth surrender to *C.* or to the lessor, *B.* the next in remainder for life being then living; this is not a good surrender, neither can it take effect as a surrender in respect of the intervenient estate. And so some say the law is if the middle remainder be but for years only: as if a lease be made for years, the remainder for years, and the first termor surrender his interest to the lessor; this is no good surrender. *Sed quare.* For it should seem that a future interest will no more hinder an actual surrender of the first lessee, than a surrender in law. And so also it seems the law is for a concurrent lease, which, for the latter part of it, is in the nature of a future interest. But if in this case it fall out the middle remainder be void; as where a lease is made to *A.* for life, or years, the remainder to a monk (who is a person incapable) for life or years, the remainder to *I. S.* in fee; in this case, *A.* the first tenant may surrender to him in remainder in fee, and the surrender is good. If lessee for twenty years make a lease for five years, and the lessee for five years enter, and after the lessee for twenty years surrender to him in reversion or remainder; this is a good surrender. So also if the two lessees join in the surrender. So also if the first lessee surrender first, and the lessee for five years surrender after. But if the lessee for five years surrender to him in the reversion, or the remainder, before the surrender of the lessee for twenty years; this cannot take effect as a surrender for two causes: 1. Because there is a remnant of the term as an intervenient estate to hinder the dawning of the term. 2. Because there wants a privity between the lessee for five years, and him in reversion. If tenant in fee-simple surrender to the Lord paramount of whom the land is held; this can never take effect as a surrender, unless it be in a special case where the Lord hath cause to have a *Cessavit*. So if tenant in tail surrender to him in remainder or reversion in fee-simple; this cannot take effect as a surrender. So if lessee for life surrender to him in remainder for years: or tenant for the life of *B.* surrender to him that hath an estate for the life of *C.* these

Perk. Sect.  
605.  
Dier 251.

for the ouster  
of the tenant for  
years is the difference  
of the term.

see page 307

Perk. Sect.  
588.

Wrotte, lay & Adam  
Pleaden 148  
5 Bac. Ab. 853  
4 Bac. Ab. 23

Dier 112.  
Plow. 190.  
Dier 93.  
Plow. 432,  
433.

Perk. sect.  
604.  
1: H. 7. 3.  
Plow. 5. 1.  
Bro. Sur. 16.

Bro. Sur. 9.  
Fitz. Sur. 10.

Perk. sect.  
589, 590.  
Co. super  
Lir. 42.  
3. 61.

\* P. 305.



these are void surrenders; for the estates of them to whom they are made, are not capable of such surrenders, for they are not greater than the estates of the surrenderors, and therefore not able to drown the estates surrendered. And yet if lessee for the life of another, or for his own life, surrender his estate to him in remainder that is tenant for his own life; this is a good surrender, for an estate for a man's own life is greater in judgment of law, than an estate for another man's life. And hence it is, that if a lease be made to two for their lives, the remainder to a third person for his own life, and one of the first tenants for life surrender his estate unto him in remainder for life; this is a good surrender for a moiety. If lessee for life or years, surrender to him in remainder or reversion that hath no good estate in the remainder or reversion, as where the remainder or reversion is granted by word only, or, being granted by deed, there is no attornment of the tenant to the grant, or the like; this surrender is not good. And yet if tenant in tail make a lease for life whereby he gaineth a new reversion (but defeasible) and the tenant for life doth surrender to the tenant in tail; this shall be a good surrender. So if a woman inheritrix have a husband, and they have issue a son, and the husband dieth, and she take another husband, and he letteth the land for life, and the wife dieth, and the tenant for life doth surrender his estate to the second husband; this is a good surrender to most purposes.

If a feme sole be seised of land in fee, and she make a lease thereof to a stranger for life, and then take a husband, and the lessee

\* P. 306.

\* surrender to the husband; this is no good surrender, neither can it enure so, because he, to whom it is made, hath not the reversion in his own, but in his wife's right (1).

2. In respect of the place where it is made: and where the surrender of lands in one county, may be good for the lands that do lie in another county: or not. It is further also required in every good surrender, that if it be made by word and without deed, that then it be made in the same county where the land to be surrendered doth lie, but by writing a man may make a surrender of lands that do lie in any other county, and in what place soever it doth lie. And a surrender may be by word, or writing, of lands lying within the same county, in any place out of the land (2). And therefore if tenant for life surrender to him in reversion in any place out of the land within the same county, and the surrenderee agree to it, the freehold is in him presently. 3. That it be made of such things, of which a surrender may be made. For surrenders may not be made of estates in fee simple, or fee tail, nor yet of rights or titles only of estates for life or years, nor yet of part of an estate for life or years; as if a man have a lease for ten years, he cannot surrender the last seven years, and keep to himself the three years. But otherwise one may surrender any kind of estate for life, as by dower, by the curtesy, or as tenant in tail after possibility of issue extinct, or for years, or years determinable upon lives, and that of any messuages, houses, lands, commons, rents, or the like, that are grantable from one to another.

(1) See accordingly 1 Wood 748.—and further in *Vin. Abr. Surrender* (A.)  
 (2) See the note before in this chapter, as to the stat. 29 Car. 2. c. 3.—that stat. does not make a deed absolutely necessary to a surrender, for it directs it to be made either by deed or note in writing, and when it is made by a note in writing, there is no occasion for any stamp-duty, it not being a deed.—1 Wilk. Rep. pt. 2. p. 27. *Farmer on the demise of Earl v. Rogers.*

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Perk. S.  
607, 609.  
Dier 25  
Bro. sur.  
35-37-  
at H.

Hil. 37 E.  
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Perk. sect.  
581, 582,  
583.  
Fitz. sur.  
Co. super  
Lit. 338.

Dier 251.  
Bro. sur. 10

(1) In t  
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ther, and such surrenders are good. 4. That there be words, or words and deeds, sufficient to make the mind of the surrenderor to appear that he is willing and desirous to part with, and yield up, the thing surrendered, into the hands of the surrenderee. And herein it is to be known, that albeit the words surrender, give, or yield up, be the most significant and proper words whereby to make a surrender, yet any other words, especially if it be in the surrender of a lease for years, that do testify and declare the will and assent of him that is the particular tenant, that he in the remainder or reversion shall have the estate of the tenant, be sufficient to pass the estate by way of surrender (1). And therefore if lessee for life or years do by word or writing say, that he will hold the land no longer, and wish him in reversion or remainder therefore to enter; or that it is his desire that he shall enter into the land, and have it, and his estate therein; or that he is content that he shall have his estate, or have his lease; such, or any such like declaration as this, made to him in reversion or remainder, will be a good surrender. So if lessee for years deliver his indenture to a stranger, to deliver it and all his estate up to him in reversion, and do appoint the stranger to deliver and surrender it to him in reversion, and he do so, and he in reversion accept thereof; this is a good surrender: but otherwise it is of an estate for life. So if the particular tenant do by the words give, grant, or confirm, pass his estate to him in reversion, and he do enter and agree to it; this is a good surrender: and by all these surrenders the estates will pass by way of surrender, except it be in some special cases where the intent of the parties doth plainly appear to be that the estate shall not pass by way of surrender. But if a lessee for life, or years, do only go from the house or land, and carry away his goods and cattle, and so waive the possession for a time, either because the lessor shall not distrain them for rent behind, or the like, and thereupon the lessor doth enter and enjoy it; this is no surrender, neither is this a good yielding up of his estate. And in such a manner, and by such words as before, any thing that may be granted by word without writing, may be surrendered by word without writing, so as it be made within the same county where the thing surrendered doth lie. And this holdeth true, albeit the estate to be surrendered were created by deed: but such things, as commons, rents, advowsons, reversions, remainders, and the like, that cannot be granted without deed, cannot be surrendered without deed. And therefore if a lease be made for life, the remainder for life, by word of mouth without any writing; he in the remainder for life cannot surrender his remainder for life without deed. So where one hath a rent, advowson, or the like, as tenant in dower, or by the curtesy; this cannot be surrendered without deed. And in case where there is any special matter to be contained in the surrender, as reservation of rent, condition, or the like, there for the most part it must be by deed; or it will not be good. And therefore if tenant for life declare himself by word of mouth to be contented and agreed that he in the reversion shall have the land and his estate therein,

\* P. 307.

(1) In the case of 1 *Wils. pt. 2. p. 27*, the court held that the words "release and discharge" were much stronger than words which have in many cases amounted to a surrender, *ut res magis valeat quam percat*.

rendering ten shillings a year rent, or paying such a sum of money, or upon condition that if he survive the lessor he shall have it again, &c. this is no good surrender. And a surrender may be made also upon a condition precedent or subsequent; as, if it be with reservation of rent, that if it be not paid it shall be void: but if it be an estate for life that is so surrendered, it seems it must be made by writing indented; and so likewise it should seem the law is of the surrender of a lease for years upon a condition, or however it is most safe so to do.

5. In respect of the agreement of him to whom the surrender is made: and what agreement is necessary. 5. That the surrenderee do agree to, and accept of it; for until then the surrender is not perfect: but if the surrenderee do once agree to it, he cannot after disagree; for his first agreement doth perfect the surrender. But the actual entry of the surrenderee into the land is not necessary. And therefore if tenant for life or years surrender to him in reversion out of the land, and he agree to it, he hath the land in him presently. And yet he may not bring any action of trespass against any man \* for any trespass done upon the land, until he have made his entry.

\* P. 308.

But here note, that in the cases before, where things may not pass by way of surrender, either because of an intervenient estate, or the like; if there be sufficient words in the deed, it may avail to other purposes, and may enure and pass the thing by way of grant; but then if it be an estate for life that is intended to be surrendered, there must be livery of seisin made upon the deed. And therefore if there be lessee for years, the remainder for life, or years, the remainder in fee; and the lessee for years in possession doth surrender and grant all his estate to him in remainder in fee; howsoever this deed cannot enure as a surrender, yet it shall enure as a good grant of the estate of the lessee for years unto him in remainder in fee.

6. How a surrender shall be construed and taken.

A surrender in general shall be taken most strongly against the surrenderor, and most beneficially for the surrenderee. And therefore if I hold of the lease of A. one acre for life, and another acre for years, and I surrender to A. all my lands, or all my lands I hold of his lease; by this surrender both the acres are surrendered. But if the surrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the lease of A. *contra*. And if I hold one acre for life of the lease of the father of I. S. and I hold another acre for life or years of the lease of I. S. himself, and I surrender to I. S. all the land I hold of his lease; by this the land that I had by the lease of his father doth not pass. A surrender to one joint-tenant shall be construed to enure to them all. But if tenant for life or years grant his estate to one of the joint-tenants in reversion, it seems this shall not enure as a surrender to them all, but as a grant to him alone.

7. Where a feoffment, lease, grant, or other act, made, or done by the tenant for life, or years, shall be a surrender or not: and how it shall enure or be construed and taken.

If the lessor make, and the lessee take, a new lease upon condition, this surrender in law is absolute; and albeit the condition be broken, yet the first lease is gone. But if the lessee surrender or grant his estate to the lessor upon condition; this condition if it be broken may revert the estate.

See more in the next question, and in *Exposition of deeds*.

If any kind of tenant for life of land in feeoff him in remainder or reversion of the land, or grant his estate to him in remainder or reversion; this shall enure as a surrender. And if lessee for years, before his term do begin, make a feoffment to him in reversion or remainder,

Perk. sect. 624. 623. Co. super 218.

Perk. sect. 608. Lit. Bro. 163.

Perk. sect. 588. 589.

Perk. sect. 615.

Perk. Sect. 610. 611.

Perk. Sect. 615.

Bro. sur. 54. Co. super Lit. 192. Co. super Lit. 218.

Bro. sur. 3. 5 Perk. sect. 616. 620. 623. Co. super Lit. 42. Bro. sur. 43.

Pasch. B. R.

Perk. 621.

Co. super Lit. 42.

Bro. sur. der 17.

Perk. sect. 615.

Bro. sur. der 52. Bro. sur. der 36.

Bro. sur. der 11.

Co. 2. 61. 3. 61.

Perk. sect. 619.

Co. super Lit. 335.

Perk. sect. 622.

Bro. sur. 20. 34. 23.

Bro. sur. 4.

Perk. sect. 623.

21 H. 7. 40.



remainder, or grant his estate to him; this shall enure as a surrender. And if lessee for life grant his estate to him in reversion, the remainder in fee to another; this shall enure as a surrender, and this remainder is void. But if such a tenant for life make a lease to him in remainder or reversion for the term of the life of him in remainder or reversion; this shall not enure as a surrender \* because it doth not give the whole estate, but it shall enure by way of grant. So if lessee for life make a lease to him in remainder in tail for term of the life of him in remainder; this shall not enure as a surrender, but as a grant, and shall end with the life of the

1. When it is made to him in reversion or remainder.

\* P. 309.

Pasch. 7 Jac.  
B. R.

Perk. sect.  
621.

Co. super  
Lit. 42.

Bro. surren-  
der 17.

Perk. sect.  
615.

Bro. surren-  
der 52.

Bro. surren-  
der 35.

Bro. surren-  
der 11.

Co. 2. 61.  
3. 61.

Perk. sect.  
619.

Co. super  
Lit. 335.

Perk. sect.  
621.

Bro. surren.  
20. 34. 23.

Bro. sur. 46.

Perk. sect.  
623.

11 H. 7. 40.

grantee. If lessee for forty years make a lease for thirty seven years on condition, and after grant his estate to him in reversion, and the second lessee attorn; this shall enure as a surrender. If there be tenant for life, the remainder in tail to a stranger, and the remainder in tail to another stranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the first tenant in tail; this shall enure as a surrender of the estate for life, and as a grant of the reversion in fee also. If tenant for life, being a woman, take a husband, and then her husband and she by deed indented make a lease to him in reversion for the life of the husband; this shall not enure as a surrender, but as a grant. If there be tenant for his own life, the remainder to *I. S.* for his life, and the first tenant for life surrender to him in remainder for the life of him in remainder; it seems this shall enure as a surrender, and is no forfeiture: but if he grant it to him for the life of a stranger, and make livery of seisin, this is a forfeiture. If lessee for life, the reversion being in joint-tenants, grant the land to one or all of the joint-tenants for twenty years; this shall not enure as a surrender, but as a grant; for there remains an interest in the lessee still as a mean estate. If lessee for years make him in reversion or remainder his executor; this shall not enure as a surrender, albeit it do give him the whole estate. If lands be given to the husband and wife, the remainder to *I. S.* and the husband discontinue in fee, and take back an estate in him and his wife, the remainder to *W. N.* and die, and the wife claim in by the second estate, and surrender to *W. N.*; this shall not enure as a surrender, but as a grant. If lessee for life or years grant his estate to him in remainder or reversion and a stranger; this shall enure as a surrender of the one half to him in reversion, and as a grant of the other moiety to the stranger. And yet it is said, that if lessee for life of land grant his estate to him in the reversion and two others, that hereby they have a joint estate, and the survivor shall have the whole. If lessee for life make a lease for his own life to the lessor, the remainder to the lessor and a stranger in fee; this shall enure as a surrender of the one moiety, and a forfeiture of the other moiety. If tenant for life surrender to the husband of a woman tenant in tail or in fee; this shall enure as a grant, and not as a surrender. And so also it seems is the law, when the surrender is to the husband and wife. And if *B.* be tenant for life, the remainder to *C.* in tail, the remainder to *D.* in tail, and *B.* infeoff *C.* and *S.* his wife in fee; this shall not enure as a surrender, but it is a forfeiture: so that if *C.* die without issue, \* *D.* may enter. If there be lessee for life, the reversion to two coparceners, and one of them take a husband, and the lessee doth grant his estate to her and her husband; this shall not

Forfeiture.

2. When it is done or made to him and a stranger.

Forfeiture.

\* P. 310.

enure as a surrender, but as a grant. And yet if tenant for life do grant his estate to the husband and wife, she having the reversion; if she be an infant and within age at this time, it seems this shall enure as a surrender, not as a grant. If tenant for life or years, and he in reversion or remainder, by word without deed join in a feoffment; it shall be said the surrender of the estate for life or years to him in the reversion, and the feoffment of him in reversion. But if he in reversion infeoff the tenant for life without any deed; this shall enure first as a surrender of the lease for life, and then as a feoffment. See more in *Deed* (1).

8. Where a deed or rent may be surrendered: and how such a surrender shall enure or be taken. If I have a rent in fee, for life, or years, issuing out of another man's manor, or other lands, I may surrender it; for if I deliver the deed of the grant of the rent to be cancelled unto any one that hath any estate of the manor or land in fee-simple, for life, or years, in possession or remainder, either solely by himself, or jointly with others, this is a good surrender, and hereby the rent is extinct and gone. But one that is tenant in tail of a rent cannot surrender it, neither will the delivering up of the deed in this case determine the rent. And if one be seised of land, out of which a rent is issuing in fee, and is disseised, and during the disseisin the grantee of the rent surrender his rent, and give up his deed; it seems this doth not extinguish the rent; yet hath the grantee no remedy for his rent when he hath delivered up his deed. And yet if one be seised of land in fee out of which a rent is issuing in fee, and he die without heir, so that the land escheat, and before the Lord enter upon his escheat, he that hath the rent doth surrender the deed of the rent to the Lord; it seems this is a good surrender to extinguish the rent. And if the grantee of a rent-charge in fee grant the same to him in fee that is seised of the land in fee; this shall enure to extinguish the rent; but if he grant it to one that hath only an estate for life, *contra*.

And now by this time it is high time we come to *Confirmations* and *Releases*, which serve to enlarge and amend the estate and interest that a man hath in a thing already.

(1) And further to whom a surrender may be made in *Com. Dig. Surrender* (F.)—*Vin. Abr. Surrender* (B.)

## C H A P. XVIII.

## Of a Confirmation.

Terms of  
the law.  
Co. super  
Lit. 295.

A Confirmation is the conveyance of an estate or right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein; whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged (1). And this albeit it may be made by other words as by *Dedi*, or *Concessi*, which are general words, and serve to make a grant, feoffment, lease, release, &c. yet it is most commonly and properly made by these words, *Confirmasse, Ratificasse & approbasse*, which do signify *ratum et firmum facere, & supplere omnem defectum*. And he that makes the confirmation is sometimes called the confirmor, and he to whom it is made the confirmee.

1. Confir-  
mation.  
*Quid.*

Confirmor.  
Confirmee.

Co. super  
Lit. 295.  
Plow. 140.  
Lit. sect.  
215.  
Co. 9. 142.

There are two kinds of confirmations, viz. a confirmation implied or in law; which is when the law by construction makes a confirmation of a deed, made to another purpose; and a confirmation express or in deed; which is when the act done, or deed made, is intended for a confirmation. And both these are always in writing. The latter is properly called a deed or instrument of confirmation; and is made after this manner, *Noveritis universi, &c. me A. de B. ratificasse, approbasse & confirmasse C. de D. statum & possessionem quos habeo de & in uno mesuagio, &c. cum pertinent. in F. &c.* A confirmation is also distinguished by its effects: for sometimes it doth tend and serve to confirm and make good a wrongful and defeasible estate, or to make a conditional estate absolute: and then it is said to be *confirmatio perficiens*. And sometimes it doth tend and serve to encrease and enlarge a rightful estate, and so to pass an interest; and then it is called *confirmatio crescens*. And sometimes it doth tend and serve to diminish and abridge the services, whereby the tenant doth hold: and then it is called *confirmatio diminuens*.

2. *Quatu-  
plex.*

Co. 146. 147.  
Dier 109.  
7 H. 6. 7.  
Lit. sect.  
539.

Co. 9. 212.

The nature and work of this, where it doth find a foundation to work upon, is either to encrease and enlarge the estate of him to whom it is made from a lesser to a greater, and to give him some new interest he had not before; or to corroborate and perfect the estate that was imperfect before; or to change the quality of it, from an estate upon condition, to an absolute estate or otherwise; for this a confirmation will do. In some cases also it will extinguish rights and titles of entry. But it will not make an estate good that is merely void; nor add to, nor take from an estate a descendible quality; nor make a man capable of it that is incapable, of himself, \* or *à contra*. In some cases also it will lessen and diminish rents or services; but it cannot neither will change the nature of

3. The na-  
ture and op-  
eration of it  
in general.

\* P. 312.

(1) Confirmation is the approbation or assent to an estate already created, which, as far as in the confirmor's power, makes it good and valid: so that the confirmation doth not regularly create an estate, but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words as are foreign to the business of confirmation, and by their own force and power tend to create the estate. *Gilb. Ten.* 75. Confirmation is of a nature nearly allied to a release, 2 *Bl. Com.* 345.



the service into some other kind of service, nor increase it into a greater service.

4. Where the confirmation of some persons is needful to perfect the grant of others: or not: and how it may be done.

If a Bishop, Dean, Archdeacon, Prebendary, or the like, make any lease of the land they have in the right of their bishoprick, deanry, archdeaconry, or prebend not warranted by the statute of 32 H. 8. and within the other statutes; it seems this lease must be confirmed by the Dean and Chapter by their common seal; and if there be two Chapters, it must be confirmed by them both; or otherwise it is not good. But if the lease be such a lease as is warranted by the statutes, the Bishop may make it without the confirmation of the King, the patron, and founder of Bishopricks, or the Dean and Chapter, and so also it seems of the rest. And a corporation aggregate, as Dean and Chapter, Master and Fellows, and the like, may grant without any confirmation of the founder, and this grant will be good (1). If a Bishop, &c. grant an ancient office belonging to his bishoprick, albeit it be but for the life of the grantee, yet it must be confirmed by the Dean and Chapter, otherwise it is not good. If a Parson or Vicar had made any lease for longer time than his own life, it must have been confirmed by the Patron and Ordinary. But at this day, albeit it be confirmed by the Patron and Ordinary, yet the lease is good for no longer than during the Parson's ordinary residence, except it be appropriated.

If tenant for life grant a rent-charge to I. S. and his heirs; in this case, he in reversion must confirm it; otherwise the grant of the rent will be good for no longer than the life of the tenant for life.

5. What confirmations may be made: and what shall be said a good express or implied confirmation, or not: and by what words it may be made.  
1. To confirm or alter the quality of the estate of him to whom it is made.

Where a man hath an interest in any lands, tenements, rents, commons, felons goods, or the like, by any grant of any of the Kings of the realm, he need not have the confirmation of every or of any succeeding King. Also it seems grants of fairs, markets, warrens, and the like, made by one King, will be good in law against his successors without any confirmation. But all such as have any judicial or ministerial offices, commissions and authorities, derived from the King, must have the confirmation of every succeeding King, otherwise they may lose them.

In every good confirmation tending to confirm an estate, or alter the quality of it, these things must concur: 1. There must be a good confirmor and a good confirmer, and a thing to be confirmed, as in other grants; and the deed must be well sealed, &c. 2. There must be a precedent rightful or wrongful estate in him to whom the confirmation is made, in his own or in another's right; or at least he must have the possession of the thing whereof the confirmation is to be made, that may be as a foundation for the confirmation to work upon. As if feoffee on condition make a feoffment over, and the feoffor confirm his estate to him to whom the second \* feoffment is made and his heirs; this is a good confirmation to make his estate abso-

(1) To the grants of a *sole corporation*, as Parson, Prebendary, Vicar and the like, the patron must give his consent; because such *sole corporation* has not the absolute fee: but a *corporation aggregate*, as Dean and Chapter, Master Fellows and Scholars of a college, &c. or any *sole corporation* that has the *absolute fee*, as a Bishop with the consent of the Dean and Chapter, may by the common law make any grant of their possessions, without their founder or patron. *Co. Lit.* 300. b.—See further in what cases the confirmation of the patron and ordinary is necessary; and as to confirmation by Dean and Chapter of the grant of the Bishop; in *Vin. Abr.* Confirmation (G.) (H.)—*Bac. Abr.* Leases (G.)

lute. And if lessee for life make a feoffment in fee, or lease for years, and the first lessor confirm this second estate, it seems this is a good confirmation. And if one disseise me of land, I may after confirm the estate of the disseisor, or of his heir if he be dead, or of his feoffee if he have aliened it; and this will make his estate good for ever: and if the disseisor make a lease for life, or years of it, I may confirm the estate of the lessee, and this will make it good for the time. And if one make a lease for life absolute, or a feoffment in fee, or lease for life on condition, or be disseised of land, and the lessee for life, feoffee or disseisor, doth grant a rent out of the land in fee, and the lessor, feoffor, or disseisee doth confirm the estate of the grantee; this doth make good the grant for ever. And so also if the heir of a disseisor that is in by descent grant a rent-charge, and the disseisee confirmeth it; this is a good confirmation. And if an infant make a lease for twenty years, and the lessee doth make a lease to another for all or part of the time, and the infant at his full age doth confirm this second lease, this is a good confirmation and doth perfect the lease; for it is a rule, that which I may defeat by my entry, I may confirm by my deed. But if there be no precedent estate on which the confirmation may work, or the estate be such an estate as is merely void, then is the confirmation void, and cannot take effect as a confirmation; as for example, if a man assign dower to a woman that hath nothing to do with it, or a court that hath not power doth make leases by commission, or an estate that was upon condition is avoided by entry, or a lessee surrender, or a disseisee enter upon a disseisor, and afterwards he that hath the rightful estate confirm their estates so defeated and gone, these confirmations are void: *Debile fundamentum fallit opus*. And a confirmation to him that hath nothing in the land is void. And hence it is, that if one confirm all his estate that he hath granted to another, when in truth he hath granted none at all, this is void. And so also it is, if there be an estate and no possession: as if a disseisor make a lease for years to begin at *Michaelmas*, and before the day the disseisee doth confirm the estate of the lessee for years; it is said this is not a good confirmation, *sed quære*. 3. The confirmor must have such an estate and property in the thing whereof the confirmation is made, as he may be thereby enabled to confirm the estate to the confirmee; as the lessors, feoffors, and disseisees in the cases before have; otherwise the confirmation is void: and therefore if the heir of the disseisee during the life of the disseisee confirm to the disseisor, this is no good confirmation to perfect his estate, albeit the disseisee die, and the right of the land descend to his heir afterwards. So if land be given to *A.* and *B.* his wife, and the heirs of their bodies issuing, the remainder in fee to *A.* and *A.* levy a \* fine with proclamations and die, and she within five years doth enter and claim, and after the conusee doth confirm the estate made by the first gift to the wife, to have and to hold according to the same; this confirmation is to no purpose. So if lessee for life make a lease for thirty years, and after he in reversion and the lessee for life lease for sixty years; in this case he cannot confirm the lease for thirty years, because he hath granted it before for sixty years. And hence it is also, that the confirmation by one joint-tenant of the estate of his companion worketh

\* P. 314.

Joint-tenants.

Co. 9. 142.

6. 15.

Perk. sect.

86.

Lit. 518.

521.

11 H. 7. 29.

28.

Co. 1. 144.

Lit. sect.

527. 529.

11 H. 7. 28.

Co. super

Lit. 300.

Lit. sect.

547.

11 H. 7. 28.

Co. super

Lit. 295.

301.

Dier. 263.

4 H. 7. 10.

Dier 109.

9 H. 6. 62.

Co. 9. 138.

Co. super

Lit. 295.

Fitz. Con-

firmation

15.

worketh nothing; for their estates are equal, and each hath interest in the whole land. And yet if one joint-tenant confirm the whole land to his companion, to have and to hold the land to him and his heirs; this shall amount to a grant, and so will be good to pass his moiety. And hence it is also, that if a man grant a rent-charge out of his land to another for life, and then confirm his estate without any clause of distress (for by a clause of distress a grant of a new rent may be made) to have and to hold to him in fee-simple, or fee-tail; this is void, for the confirmor hath no reversion of the rent in him. 4. The precedent estate must continue until the confirmation come; as in all the cases of voidable estates the confirmation must be before the estates be made void by entry; &c. or otherwise the confirmation will be void. And therefore if lessee for life or years surrender, or the disseisee enter upon the disseisor, and after the lessor or the disseisee confirm the estate of the lessee or disseisor; this confirmation comes too late. 5. The estate precedent, and that which is to be confirmed, must be lawful and not prohibited by any Act of Parliament. And therefore if a spiritual person, as Prebend, or the like, make a lease not warranted by the statutes; the confirmation of the Dean and Chapter will not help nor amend it. And if tenant in tail made a voidable lease, and after confirm it himself, this is voidable still. 6. There must be apt words of confirmation in the deed or instrument. And herein note, that albeit the words *confirmavi*, *ratificavi*, & *approbavi* be the most significant and proper words to make this conveyance, yet such as are made by other general words may make a good confirmation. And therefore it is agreed, that a deed made by the words *dedi*, *concessi* or *demisi*, may make a good confirmation. And therefore that if the disseisee, coparcener, or lessor, make a deed of the land by the word *dedi* or *concessi* to the disseisor, other coparcener, or lessee for life, and deliver the deed; this is a good confirmation without livery of seisin (1). Also if a feoffment be made to A. to the use of B. and his heirs upon condition, and before the condition broken, the feoffor and B. do join in the grant of a rent-charge, and after the condition is broken; in this case, the law doth interpret this a good grant from B. and a good confirmation of the feoffor without any words of confirmation. So if tenant for life do grant a rent to him in reversion, and he by deed doth grant it to another and his heirs in fee; in this case, the law doth construe this a good grant and a confirmation also. And in these cases of con-

Livery of  
seisin.

\* P. 315.

(1) The words *dedi* & *concessi*, are as strong as the word *confirmavi*, for they amount to a grant of the right of the person in possession; and if he has any right I can never after impeach his estate. *Gibb. Ten. 79.*—See further what words shall enure as a confirmation, in *Vin. Abr. Confirmation (X.)*—*Madox* in p. 19 of the *Dissert.* prefixed to the *Formul. Angl.* says, that most ancient confirmations made after the conquest, often run like feoffments, with the words, *Dedi*, or *Concessi*, and *Confirmavi*: and are distinguishable from the feoffments, chiefly by some words importing a former feoffment or grant; as where they run, *Dedi*, or *concessi* & *confirmavi*, such lands *sicut charta facta* to such a one (either the confirmatory or his ancestor) *testatur*, or the like—In ancient time, when feoffees were frequently disseised of their lands upon some suggestion or other, charters of confirmation seem to have been in great request. For in the early times after the conquest, we meet with so many confirmations successively made to the same persons, or their heirs or successors, of the same lands and possessions; that it looks as if men did not then think themselves secure in their possessions against the King or other great Lords, who were their feoffors, or in whose fees their lands lay, unless they had repeated confirmations from the King or his heirs or successors, or the other great Lords or their heirs. And these confirmations, very anciently, seem to have been sometimes made either by precept or writ from the King or other Lords, to put the feoffees or their heirs or successors into seisin after they had been disseised, or to keep them in their seisin undisturbed, or else by charter of express confirmation.

firmations



Lit. sect.  
519.  
Co. super  
Lit. 296.

firmations of estates, if it be by the disseisee to the disseisor ; it is good without any words of heirs : as if the disseisee confirm the estate of the disseisor, or confirm the land unto him, and say not to him and his heirs ; this is an effectual confirmation to him and his heirs for ever. And if a lessee for life or a disseisor make a lease for life, or years, &c. and he in the reversion, or the disseisee confirm their estates, and not the land, and without any *Habendum* or limitation of estate ; this is good for so long as the estates do continue. But it is most safe always to express the estate, *i. e.* to say, to have and to hold the land to him and his heirs, or for life, &c. as the agreement is. If lessee for life grant a rent to one and his heirs out of the land, and the lessor doth confirm the estate, or the rent-charge, this doth make the estate of the rent sure. And so also if he do confirm the rent, and say, to have and to hold to him and his heirs ; this is a good confirmation. But if he confirm the rent, to have and to hold to him in fee, without naming his heirs, hereby his estate is not made better (1).

Co. 1. 147.

Co. 9. 139.  
F. N. B.  
136.  
Co. 8. 76.  
Dier 10

If the lessor confirm the estate of his lessee for life with this clause, to hold without impeachment of waste ; this is a good confirmation to change the quality of the estate so far as to make it dishonourable of waste. So if the Lord paramount confirm the estate of the mesne with clause of acquittal. And so if lessee for years, or for another's life, be without impeachment of waste, and the lessor confirm to him for his own life, and omit that clause ; hereby this privilege is gone and the estate is become punishable for the waste.

2. To enlarge the estate of him to whom it is made.

Co. 9. 142.  
super Lit.  
385.  
Dier 145.  
296.  
Co. 6. 15.  
Lit. sect.  
533-532.  
523  
Dier 263.

This kind of confirmation *crescens*, must have all the qualities of the former : and there must be also in this case a privity between the confirmor and the confirmee. And then it may enlarge the estate of him to whom it is made, as from an estate at will to an estate for years, or to a greater estate ; from an estate for years, to an estate for life, or to a greater estate ; from an estate for life, to an estate in tail, or in fee ; and from an estate tail, to an estate in fee ; and these confirmations are good. But in all these kinds of confirmations, care must be had of the manner of penning them ; and that in every such deed there be a limitation of the estate ; *i. e.* that these words be inserted, to have and to hold the tenements, &c. to him and his heirs ; or to him and the heirs of his body ; or to him for term of life, or years ; as the agreement is ; for if lessee for life make a lease for years, and then lessee for life and he in reversion, confirm the land, to have and to hold to him for life, or to him and his heirs ; these words will make the estate to encrease. But \* if the confirmation be made to the lessee for life or for years of his term or estate, and not of the land ; as when he doth confirm his estate, to have and to hold his estate to him and his heirs ; this doth not increase the estate. And yet if he confirm the land, to have and to hold the land to him and his heirs ; this will increase the estate, *Et sic de similibus*.

Lit. sect.  
524. 545.  
Plow. 540.

\* P. 316.

(1) See accordingly verbatim in 1 Wood 710. If the student compares this chapter on confirmation, or any other in this book, with the chapter on the same doctrine, in 1 Wood, he will easily discern how much the author of that book stands indebted to the *Touchstone*. It is to be lamented that in copying the *Touchstone*, he has very frequently transposed the parts of it, and thereby greatly diminished the order of its beautiful analytic arrangement.

If the husband have an estate of land for life, or years, in the right of his wife; or to them both for life, and a confirmation to him alone, of his estate, or of the land, to have and to hold the land to him and his heirs: this is a good conveyance of the fee-simple to him after the death of his wife. And if I let land to a woman sole for the term of her life, who taketh a husband, and after I do confirm the estate of the husband and wife, to have and to hold for term of their two lives; this is good, but it shall enure only to enlarge his estate for term of his life if he survive his wife. But if one lease to another for life, and after confirm the estate of the lessee to him and his wife for term of their two lives; this is void as to his wife.

If one grant a rent-charge out of his land for life, and after the grantor confirm the estate of the grantee in the rent without any clause of distress, to have and to hold to him in fee-simple, or fee-tail; this confirmation is not effectual to enlarge the estate. But if a man be seised of an old rent-charge or rent-service, and grant the same first for life, and after confirm the estate of the grantee in fee-simple or fee-tail; this is good, and will enlarge the estate accordingly.

If tenant for life grant a rent out of the land, to one and his heirs during the life of the lessee for life, and after the lessor confirm the rent of the grantee and his heirs; it seems the estate is not hereby enlarged, but when the tenant for life doth die, the rent shall cease.

This kind of confirmation may be made by the same words as the former, viz. by the words, give, grant, or demise. But neither of these may be made by the words surrender, release, exchange, or the like: for these are peculiar words destined to a special end, being proper and peculiar manner of conveyances. And yet if I that am a lessor do say to my lessee for years by my deed, I will that you shall hold the land for your life; this is a good confirmation to encrease the estate by this word *only*. So if I grant to my lessee for years, that he shall hold the land for term of his life, this without any other words is a good confirmation.

3. To diminish or abridge the services, &c. By a confirmation the Lord may confirm the estate of his tenant which holdeth by knight's service to hold in socage; or to hold for a less rent; or to hold at common law, where before he did hold in ancient demesne; and such a confirmation is good. But

\* P. 317. such a \* confirmation as is to hold by new services, as a rose for money, or the like, is not good for that purpose. And in this case there must be also a privity. And therefore if there be Lord, mesne, and tenant, and the Lord confirm the estate of the tenant to hold by less services; this is void. And if the Lord confirm to his tenant after he is disseised before his entry, to hold by less services; this is void.

6. Where a confirmation may be good for part of the estate, or for part of the thing: or not. A confirmation may be by apt words in case of a lease for years for part of the time, but in case of a freehold it cannot be so. And so also it may extend to part of the thing before in estate. And therefore if a disseisor, tenant in tail, or husband of the land he hath in the right of his wife, or lessee for life, make a lease for years, and the disseisee, issue in tail, wife, or lessor make a confirmation of all the land for part of the time, or of part of the land for all the time; this confirmation is good. But if any such person make a lease for life, gift in tail, &c. the disseisee &c. cannot

11 H. 7.  
Co. 1. 14.  
2. 142.

Lit. sect.  
515. 536,  
537.

Co. super.  
Lit. 298.

Co. super.  
Lit. 305.

See before.

Co. super.  
Lit. 299.

Co. super.  
Lit. 299.  
Plow. 160.  
Lit. sect.  
525.  
Fitz. Con-  
firmation 7.  
17.

Lit. sect.  
548. 549.

Co. 1. 147.

Co. super.  
Lit. 301. b.  
Fitz. Con-  
firmation  
23.

Co. 9. 141.  
Lit. sect.  
538.

Co. 5. 81.  
Lit. sect.  
5. 19.  
Co. super.  
Lit. 297.  
Lit. sect.  
520.

cannot confirm part of the estate but he must confirm all. And therefore if he confirm his estate for one hour, it is a confirmation of the whole estate. And so also if he confirm the land to the disseisor himself but one hour, one week, one year, or for his life, &c. this is a good confirmation of the estate for ever. And if it be a lease for years that is confirmed, care must be had to the manner of the confirmation; for if the confirmation be of the estate or the term for one hour, this is a good confirmation for the whole time: and therefore the confirmation must be had of the land, to have and to hold for part of the term; and being so made, it may be good for that time only, and no longer.

11 H. 7. 29.  
Co. 1. 146.  
2. 142.

If I make feoffment on condition, and before the condition broken I confirm the estate of the feoffee absolutely; this will not extinguish the condition. And yet if the condition be broken first, so as my entry is lawful; in this case, the confirmation will extinguish the condition. And if the feoffee on condition make a feoffment over absolutely to another, and I confirm the estate of the second feoffee, whether it be before or after the condition broken; by this the condition is discharged.

7. The force and virtue of it: and how it shall enure and be construed and taken.

Lit. sect.  
515. 536,  
537.

If the Lord confirm the estate of his tenant in the tenements; or one that hath a rent, common, or profit out of land confirm to the terre-tenant his estate; in these cases, notwithstanding this confirmation, the seignior, rent, common, &c. do continue, and this shall not enure to extinguish it.

Co. super.  
Lit. 298.

If the disseisor and a stranger disseise the heir of the disseisor, and the disseisor confirm the estate of his companion; this shall not enure to extinguish the suspended right of the disseisor, but when the heir of the disseisor shall re-enter it shall be revived. And if the grantee of a rent-charge, and a stranger disseise the tenant of the land, and the grantee confirm the estate of his companion; \* this shall not enure as to the rent suspended, to extinguish it, but \* P. 318. after the re-entry of the tenant, the rent shall be revived.

Co. super  
Lit. 305.

If a man hold his land of me by Knight's service, rent, suit of court &c. and I confirm his estate to hold of me by Knight's service only, for all manner of services and demands; in this case, albeit this do abridge the service, yet it shall not be construed to take away wardship, relief, and to marry my daughter, and make my son Knight, and the like.

See before.

If I have an estate in land for my life, and he in reversion doth confirm the estate to me and my wife for the term of our lives, this shall enure only as a confirmation of my estate, and not so as to give any estate to my wife. But if I have a lease for life or years in right of my wife, and he in the reversion do confirm the estate to me and my wife, to have and to hold to us for our lives; this shall enure not only to confirm the estate, but also to create an estate to me after my wife's death: and in the case of a lease for years, it maketh our estate joint; but in the case of a lease for life, I shall take by way of enlargement of estate for my life after my wife's death. And if in this case the confirmation be to me and my wife, to have and to hold the land to us two and our heirs; this shall enure to us in fee-simple as joint-tenants. If land be let to husband and wife, to have and to hold the one moiety to the husband for his life, and the other moiety to the wife for her life, and the lessor confirm to them both their estate in the land, to have and to hold to them and their heirs; in this case, as to the one moiety

Co. super  
Lit. 299.

husband and wife take by a trustees and cannot as joint-tenants  
Co. Litt. 187. s.  
Doe v. Barnard 5 M. 66.  
Brick v. Whalley 1 W.  
Black v. Brindley 2 W.  
Green v. King 120  
2 B. & C. 1211.

*Demer v. Whitfield 1 Sand. on Uses 297  
If husband alien and then wife die in husband's lifetime  
the alienation takes it absolutely*



moieties, it doth enure only to the husband and his heirs, but as to the other moiety they shall be joint-tenants. And yet if such a lease for life be made to two men by several moieties, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; by this they are tenants in common of the inheritance.

If the disseisee confirm the estate of the disseisor, to have and to hold to him and his heirs of his body engendred, or to have and to hold to him for term of his life; this shall enure to him as a fee-simple, and shall confirm his estate for ever.

If my disseisor make a lease for life, the remainder over in fee, and I confirm the estate of the tenant for life; this shall not enure to, nor avail him in remainder. And if the disseisor make a gift in tail, the remainder to the right heirs of the tenant in tail; and the disseisee confirm the estate of the tenant in tail; this shall not extend to the fee-simple, no more than if the disseisor make a gift in tail, the remainder for life, the remainder to the right heirs of the tenant in tail; and the disseisee confirm the estate of the tenant in tail; for this shall extend only to the estate tail, and not to the remainder for life or in fee. But if the disseisee in the first case confirm the estate of him in the remainder; this shall enure to and avail the tenant for life. And so if a disseisor make a lease for life and keep the reversion, and after the disseisee doth confirm to the disseisor; this shall enure to the tenant for life. And so if a disseisor make a lease for life to *A.* and *B.* and the disseisee confirm the estate of *A.* this shall enure to *B.* and make his estate good also in the other moiety. And so if there be two disseisors, and the disseisee confirm the estate of one of them without saying more; this shall enure to them both. But if the confirmation be of the land, to have and to hold the land to one; in this case, it may enure to him alone. So if a disseisor infeoff *A.* and *B.* and the heirs of *B.* and the disseisee confirm the estate of *B.* albeit it be but for his life; yet this shall enure to both and to the whole fee-simple.

If a lease be made for life to *A.* the remainder to *B.* for life, and the lessor confirm their estates in the land, to have and to hold to them and their heirs; this shall enure as to the one moiety to *A.* in fee after the death of *B.* and as to the other moiety in fee to *B.* after the death of *A.*

If lands be given to two men and the heirs of their two bodies begotten, and the donor doth confirm their estates in the land, to have and to hold the land to them two and their heirs; it seems this shall enure to them as a joint estate for their lives, and after for several inheritances.

If the lessee for life, or the disseisor, doth make an absolute lease for years, and he in the reversion, or the disseisee, doth confirm the estate of the lessee for years; this makes the lease good for all the time. So if the disseisor makes a lease for life, and the disseisee doth confirm the estate of the lessee for life; this makes the estate good for the life. And if he in reversion confirm the estate of the termor but one hour; this doth make it good for all the term. And if an estate for life or in fee be confirmed but for one hour; it is a good confirmation for all the estate. And if the disseisee confirm the estate of the disseisor, to have and to hold for one hour, year, or for life, or in tail; this is a good confirmation for ever, and makes

quest?  
wrong again  
the Baccins in  
the Locke

\* P. 319.

Dier 52.  
339.  
Co. 5. 81.

Lit. sect.  
606. 607.  
610.

Co. 1. 147.  
super Lit.  
301.

Co. super  
Lit. 299.

Co. Idem

Lit. sect.  
516. 517.  
519. 520.  
521.  
Co. 5. 79.

makes his estate unavoidable. And yet if the disseisee confirm the land, *Habendum* the land for life, or in tail, &c. *contra*.

*Does the Hab.  
make the diff.  
page 317*

Dier 52.

339.

Co. 5. 81.

If a voidable lease be made for forty years; and the lessor confirm the term for twenty years; this is a good confirmation of the whole term. But if he confirm the land for twenty years, it may be good for that time only, and no longer; wherein, as in divers other cases before, observe that the very words, whereby the confirmation is made, are much to be heeded; for *parols font plea*.

Lit. sect.

606. 607.

610.

If tenant in tail or for life of land, letteth it for years, and after confirm the land to the lessee for years, to have and to hold to the lessee and his heirs for ever: by this the lessee hath only an \*estate\* for term of the life of the tenant in tail, or for life; and therein his lease for years is extinct.

*Mitchell v. Clarke  
contin*

P. 320.

Co. 1. 147.

super Lit.

301.

If tenant for life doth grant a rent to another and his heirs during the life of the tenant for life, and the lessor confirm to the grantee and his heirs; this shall be construed to be an estate for life only, and no enlargement of the estate. But if tenant for life grant a rent-charge in fee, and the lessor confirm it, this shall be construed to be a confirmation of the fee-simple.

See more in *exposition of deeds, cap. 5. in toto*: and more also in the chapter of *release*, whereunto we are now come in the next place.

## C H A P. XIX.

## Of a Release.

1. Release.  
*Quid.*

A Release is the giving or discharging of the right or action which a man hath, or may have or claim, against another man, or that which is his. Or it is the conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof or some estate therein (1). And this, albeit it may be made by other words, as *dedi, concessi, or renunciavi*, or such like, yet it is most commonly and properly made by these words, *remisi, relaxavi, & quietum clamavi*, all which are much to one purpose (2). He that makes the release is sometimes called the releasor, and he to whom it is made the releasee.

Releasor.  
Releasee.2. *Quotum  
plex.*

There are two kinds of releases like unto those of confirmation, *viz.* a release express or in deed; and that is a purposed release, when the act done, or deed made, is intended a release. And this is always done by writing. And then it is defined by some to be an instrument whereby estates, rights, titles, actions, and other things be sometimes extinguished, sometimes transferred, sometimes abridged, and sometimes enlarged, which is after this manner. *Noverrint, &c. me A. de B. remisisse, relaxasse, & omnino de me [vel pro me] & hered. meis quietum clamasse C. de D. totum jus, titulum & clameum quæ habui, habeo, vel quovismodo in futuro habere potero, de & in uno mesuagio cum pertinet in F. &c.* And a release implied or in law; and that is when the law by intendment and construction and by way of consequent doth make a release of an act done to another purpose. And this is sometimes by writing, and sometimes without writing. These releases also are sometimes of a bare and naked right, and sometimes of a right accompanied with some estate or interest; and sometimes they are of actions real or in lands or tenements, and sometimes of actions personal or in goods or chattels, and sometimes of actions mixt partly in the realty and partly in the personalty (3).

## \* P. 321.

## 3. The nature and operation of it in general.

\* A release is much of the nature of a confirmation; for in most things they agree and produce the like effects. This therefore is said sometimes to enure by way of *mitter le estate*, *i. e.* by way of giving or transferring or enlarging of an estate or interest; and so doth give some new interest or estate to him to whom it is made. And sometimes it is said to

(1) For it is contrary to the nature of a release to give possession, 4 Co. 25 — Hutt. 65. — and therefore one tenant in common cannot release to his companion because they have distinct freeholds, Co. Lit. 200. — A release cannot operate but upon an estate, interest, or right, Rol. Rep. 197. — When a man has the right and possession in him, he must convey by feoffment, which made a notoriety amongst the tenants by the feoffment *coram paribus*. When a man was out of possession, he might convey by release only; for the disseisor had the possession, which of itself made the notoriety, and the release transferred the right; so that a release is a conveyance of right to a person in possession. — Gilb. Ten. 53.

(2) Ancient releases were usually distinguishable from feoffments by the words *quietum clamavi, remisi, relaxavi, &c.* — to which words, others were sometimes joined, such as *abjuravi, forisjuravi, jurisaffirmavi, &c.* upon a charter of release, seisin has been delivered to the releasee, or an act done that was like giving seisin. — See further in *Mad. Form. Angl. Dissert.* p. 19.

(3) See accordingly 1 Wood 696. — and more amply as to releases express and implied, how and in what manner they are respectively created, in *Bac. Abr. Release (A.)* and *(B.)* — *Com. Dig. Release (A.)*



enure by way of *mitter le droit* only, i. e. by way of giving, transferring and discharging of a right title or entry unto him to whom it is made. And so it doth sometimes perfect an estate that was imperfect and defeasible before, and enure by way of entry and feoffment. And sometimes also it doth enure to make a conditional estate absolute. And sometimes also it doth work and enure by way of extinguishment or discharge: and then also sometimes it doth enure by way of discharge or extinguishment as against all persons, and also as that wherof all persons may take advantage. And sometimes it doth enure only as a discharge against some persons only, and as to or against other persons by way of *mitter le droit*. And some of these in deed enure by way of extinguishment; for that he to whom the release is made cannot have the thing released. And some of them have some quality of such releases, and are said to enure by way of extinguishment, but in truth do not; for that he to whom the release is made, may receive and take the thing released. And in some cases also a release, like a confirmation, doth enure by way of abridgment. But a man cannot bar himself hereby of a right that shall come to him hereafter. And therefore it is held that these words used in releases [*quæ quovismodo in futuro habere potero*] are to no purpose.

Co. 10. 48.  
Super Lit.  
268. 269.  
266.

Lands, tenements and hereditaments themselves may be given and transferred by way of release; and all rights and titles to lands may be given, barred, and discharged by release; and so also may rights and titles to goods and chattels. Also all actions, real, personal and mixt, may be given, discharged or extinct by release; for howsoever rights and titles of entry cannot be granted by act of the party; nor may any action be granted from one man to another by act of the law or the party; yet all these may be released to the terre-tenant. And a right to a free-hold or inheritance, seignior, or rent, in *presenti* or *futuro*, may be released five manner of ways, and the first three ways without any privity at all. 1. To the tenant of the free-hold in deed or in law. 2. To him in the remainder. 3. To him in reversion. The other two ways in respect of privity without any estate or right, as by demandant to vouchee, donor \* to donee after the donee hath discontinued.

*In his case, cannot release his hope for a portion in the lifetime of his ancestor.*  
4. What *Mortimer* saith things may be released: *M. 365* or not; and but he is how, *bound in equity*. There is no equity against the heir. See *some cases*. As to the *Heir apparent* legging a fine *Helm 2* *Step 2 B. 8. 266* *See 10. 10. 456*

\* P. 322.

Also conditions annexed to estates, powers of revocation of uses, warranties, covenants, tenures, services, rents, commons and other profits to be taken out of lands, may be discharged, extinguished and determined by release to the tenant of the land, &c.

Also possibilities of land, &c. if they be near and common possibilities, albeit they be not grantable over to another person, yet may they be released to him that hath the present estate of the land. And therefore if a man possessed of a term devise it to A. for life, the remainder to B. and his heirs males during the term; in this case, albeit B. may not grant his interest over, yet he may release it to A. And if A. devise to B. twenty pounds when he comes to the age of twenty-four years, and die, in this case B. after he is of the age of twenty-one years, may release this legacy.

*Math. Worsley's case*

*He may always release when the term is discontinued, as to a release by a husband of property in right of his wife then seems to be the*

So a covenant to do a future act may be released before it be broken. And it seems also the donee of a statute or recognition may release to a feoffee of part of the land, and so bar himself.

*Extinction of the possibility may happen during coverture. There may be a release; just, it will not avail.*

Co. 10. 47.  
51. 52.  
5. 70. 71.  
Super Lit.  
265.  
Lit. sect.  
426.  
Co. 1. 111.  
111.  
Dier 57.  
Co. 1. 113.  
174.

himself of execution of that land. And if I grant to *I. S.* that if he do such a thing he shall have an annuity of twenty pounds for his life; in this case, it seems *I. S.* may release this before the condition be performed.

And if I make a feoffment to *I. S.* to divers uses, with power to revoke it; I may release this power to one that hath an estate of freehold in possession, reversion or remainder, in the land. And yet if I make a feoffment to *I. S.* with proviso, that if *B.* revoke, the uses shall cease; in this case, *B.* cannot release this power. And a remote possibility, that is altogether uncertain, cannot be released. And therefore if the son of the disseisee release to the disseisor in the life-time of his father; this release is void. And so if the donee of a statute release his right to the land of the donor before execution; this release is void. And so if a plaintiff release to a bail in the King's-Bench before judgment given, this release is void (1).

So if one promise to pay me ten pounds upon the surrender of my land to him, and that if he shall sell it for above fifty pounds that then he shall pay me ten pounds more, and I release this to him before he do sell it, and before I do surrender; in this case, this doth not release the second promise, because it is not releasable.

Also debts, legacies, and other duties may be released and discharged thereby before or after they become due. And therefore a rent or annuity may be released before the day of payment, and so also may a debt due by obligation, judgments, executions, recognizances, and the like, by apt words be discharged by release.

\* If the charge or duty grow by record the discharge and release thereof must be by record also. And if it grow by writing, the discharge and release must be by writing also. *Nihil est magis rationi consentaneum quam eodem modo quoque dissolvere quo conflatum est.* And therefore a duty growing by a verbal agreement may in some cases be released by word without writing. But regularly lands and tenements cannot be given, nor rights and titles to lands, and actions be discharged by release without a deed in writing.

Condition.  
Defeasance.

A release that doth enure by way of *mitten le estate, mitten le droit*, or extinguishment, may be made upon condition, or with a defeasance, so as the condition or defeasance be contained in the release, or delivered at the same time with it: for no defeasance made after can avoid the force of a release made before. And yet a release may be delivered as an escrow, and so the force of it may be suspended for a time. But a release of a condition may not be made upon a condition. Nor may a release of a chattel be upon a condition subsequent, but it may be upon a condition precedent. And therefore if a man release a debt to another upon condition that the releasor may have

(1) It is said to be a general rule that a meer possibility cannot be released; and the reason thereof is, that a release supposeth a right in being; and it was thought to countenance maintenance, to transfer choses in action, possibilities and contingent interests.—10 Co. 48. a.—*Cro. Eliz.* 552.—but note the distinction made in 10 Co. 48. between a grant or assignment of possibilities and choses in action to a stranger, and a release of rights, titles and actions to the terre-tenant.—A possibility cannot be released; as money to be paid on the birth of the next child, which may never happen; and because it is no debt or duty, it cannot be discharged, *Brownl.* 109. *Neal and Sheffield.*—*Telsr.* 192. S. C.—See further how far a possibility or contingent interest may be released, in *Bac. Abr.* Release (H).

such

such as an  
Intent to a  
person for a certain  
as the sum of  
A. B.

5 Bac. Abr. 654

In fact, P. 323.  
may be  
released by  
deed.  
5. How and  
after what  
manner  
these things  
may be re-  
leased.

Ych it must be a  
condition precedent  
in case of a release  
from written deed  
or in fact.

may it not be  
a condition precedent

Cha  
Dier  
21 H  
Co. f  
Lit. 2  
Lit. f  
467.

Adjud  
Berke  
Perk's  
Hil. 9  
B. R.

Dier 2

Per Ju  
Jones,  
Dier id

Adjudg  
Trin. 5  
B. R.  
Butler  
case.

Lit. sec  
598.  
Plow. 5  
Co. sup  
Lit. 34

Co. sup  
Lit. 270  
273. 26

Lit. sec  
459.  
Plow. 4  
Dier 4.  
15 H. 7

Dier 307. such a debt owing from a third person to the releasee; this is a  
21 H. 7. 24. good condition.

Co. super  
Lit. 274.  
Lit. sect.  
467.

A release of all actions may be made until a time past, as until the first of May last, or until the day of the date of the release: and this will discharge all actions till then, and none after. But a release cannot be made of a right or action for a part of an estate or for a time only, as for one year, or until Michaelmas next, or the like: for a release of such a thing for one day, or for one hour, is a release of it for ever. And yet a man may release his right in a part of the land. And therefore if a man be disseised of two acres, he may release his right in one of them, and enter into the other acre. Also a release, in the nature of an acquittance, may be of part of a debt. And therefore if one be bound in an obligation of four hundred pounds, to pay two hundred pounds at Michaelmas, and at Christmas after the obligee by his deed released three hundred ninety pounds parcel of the said four hundred pounds; this is a good release for so much, and no more.

Adjudged  
Berkley and  
Perk's case.  
Hil. 9 Car.  
B. R.

In every good release in deed, howsoever it enure, these things are requisite. 1. That there be a good releasor, and a good releasee, and a thing to be released. 2. That the deed be well sealed, delivered, &c. And if it tend and enure by way of enlargement of estate, then these things are further required to make the release good. 1. He that doth make the release, must have such an estate in himself, as out of which such an estate may be derived and granted to the releasee, as is intended by the release: \* as if he have the reversion in fee of lands, he may release to a tenant for years, and thereby encrease his estate to an estate for life or in tail, or he may pass his whole fee-simple by the release. But if there be lessee for years rendering rent, and the reversion is granted for life, the remainder over in fee, and the grantee of the reversion release all his right to him in remainder, and then he in the remainder grant the reversion, and the tenant for life release to the grantee also; in this case, it seems both these releases are void, and cannot enure as releases, howbeit it may be if they have words of surrender in them, they may enure as surrenders. So if there be lessee for years, the remainder in tail, the remainder in fee; and the lessee for years, being a woman, doth marry with him in the remainder in fee, and he in remainder in tail release to him in remainder in fee; this is a void release. So if tenant for life release to him in remainder in fee or in tail; it seems this is void, and cannot enure as a release. So if there be tenant for life, the remainder in tail, the remainder in fee, and he in remainder in fee release to the tenant for life; this will not increase his estate. And if the tenant in tail in this case release to the tenant for life; his estate shall be no longer increased hereby than for the life of the tenant in tail. 2. He to whom the release is made, must have some estate in possession in deed or in law, or in reversion in deed, in his own or another's right, of the lands whereof the release is made, to be as a foundation for the release to stand upon: for a release, which must enure to enlarge an estate, cannot work without a possession joined with an estate. And therefore the releasee must be lessee for life, years, or tenant by statute merchant, staple, or elegit, or as guardian in chivalry, that doth hold the land over for the value; or at least he must be tenant at will. And therefore if a man let his land to another for term of years, to begin presently, and after the lessor or his heir doth release

Dier 251.

Per Justice  
Jones, 5 Car.  
Dier idem.

Adjudged  
Trin. 5 Jac.  
B. R.  
Butler's  
case.

Lit. sect.  
498.  
Plow. 556.  
Co. super  
Lit. 345.

Co. super  
Lit. 270.  
273. 265.

Lit. sect.  
459.  
Plow. 423.  
Dier 4.

15 H. 7. 14.

6. What releases may be made of lands or tenements: and what shall be said a good release in deed: or not: and by what words it may be made.

1. When it doth enure by way of enlargement or passing of an estate. 1. In respect of the estate of the releasor.

\* P. 324. Surrender. 2. Wilson 78.

2. In respect of the estate of him to whom the release is made.

It would appear to be a grant but if by him in reversion it would operate as a release. infra 326.

Y



lease to the lessee (after his entry and being in possession) all his right in the land; this is good to enlarge the estate according to the time set down in the release: but if the release be before the term begin; or after the term begin, and before the lessee have entered; (howsoever if any rent be reserved on the lease it may enure and be good to extinguish that rent) yet it is not good to enlarge the estate. And yet if a tenant for twenty years in possession, make a lease to B for ten years, and B. enter, and he in the reversion, release to the first lessee for years; this is a good release to enlarge the estate. So if a man make a lease for years, the remainder for life or years, and the first lessee doth enter; in this case, a release to him in remainder is good to enlarge the estate. So if I grant the reversion of my tenant for life to another for life, and after release to him and his heirs; this is a good release to enlarge the estate.

\* P. 325.

\* So if a man make a lease for life, or years, to a feme sole, and she take a husband, and he in the reversion release to the husband and his heirs; this is a good release to enlarge the estate according to the words of the release. But if the case be so that a man had an estate in possession of land, and he be now out of the possession of it, and have but a right only to it; or if he have a possession only and no estate; or if he have neither estate nor possession; in these cases, a release made to such a one will not avail to enlarge his estate. *but will operate as a grant*

And therefore if a man make a lease for life, the remainder for life, and the first lessee dieth, and the lessor release to him in remainder for life, before his entry; this is a good release to enlarge his estate, for he hath an estate of freehold in law, capable of enlargement by release before entry. But if there be lessee for life, the remainder for life, the remainder in tail, the remainder in fee, and the lessee for life is disseised, and during the possession of the disseisor, he that hath right doth release to one of them in the remainder; this is void. So if lands be given in tail or leased for life, and the donee or lessee is disseised, and, during the possession of the disseisor, the donor or lessor doth release all his right to the donee or lessee; this is void, and will not enlarge his estate: howbeit if there be any rent reserved on the estate, it will extinguish the rent. So if the tenant by the curtesy grant over his estate, and after he in reversion doth release to the tenant by the curtesy; in this case, his release is void, and will not enlarge his estate. So if an infant make a lease for life, and the lessee granteth the estate over with warranty, and the infant at full age doth bring a *Dum fuit infra aetatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant, being the infant, doth release to him and his heirs; this will not enlarge his estate; for in truth he had no estate before, and that which is not, cannot be enlarged: and if lessee for life, or years, release to him in remainder or reversion; this cannot be good as a release: howbeit if there be apt words, it may amount to a surrender. And if a man have only an occupation of land as tenant at sufferance, as when a lessee for years doth hold over his term, or the like; no release to him can work any enlargement of estate: for albeit he have a possession, yet hath he no estate; and besides in this case there is no privity, which is the third thing required in these releases. For as in all these releases that enure by way of increase or passing an estate, there must be some estate in the releasor and the

3. In respect of privity.

Co. super Lit. 273.

Co. super Lit. 270.

Lit. sect. 451.

Lit. sect. 455-456.

Co. super Lit. 273.

Dier 251.

Co. super Lit. 271. Lit. sect. 461.

Co. super Lit. 296. Lit. sect. 461.

as tenant by sufferance

These Estates are reduced to a right of entry Goodright, Forfeiture 1 Tamm. 578.

Plow

Co. super Lit. 273. Dier 251. Co. 3

Plow. 14 H. Lit. sect. 518.

Co. super Lit. 270.

Bro. Re 71.

Co. super Lit. 273. 516.

Bro. Re 77. Perk. 84.

(1) A tenant n thereto. his comp

the releasee, so there must be some privity in estate between them at the time of the release made; for an estate without privity is not sufficient. And therefore it must be, between donor and donee, lessor and lessee, \* and the like; as in the cases before, between him in reversion and the lessee for life or years, tenant by statute merchant or staple, or by elegit, or guardian in chivalry, that keepeth the land for the value. And if tenant for life lease

Plow. 541.

Co. super

Lit. 273.

Dier. 4.

Co. 3. 22.

Plow. 540.

14 H. 7. 4.

Lit. sect.

518.

Co. super

Lit. 273.

Bro. Release

71.

Co. super

Lit. 273.

Lit. sect.

516.

Bro. Release

77.

Perk. sect.

84.

for years, and he in the reversion and the tenant for life do join together and release to the lessee for years; this is a good release to enlarge the estate. So if he in reversion release to the husband that hath an estate in the right of his wife only for life or years; this is a good release. So if lessee for years make a lease of the land but for part of the term, the privity continueth still, and therefore a release to him is good to enlarge the estate. But if he assign over all the term, then the privity is gone, and therefore a release made to him afterwards is void: and then a release, made to the assignee of the term, is good to enlarge the estate. And if a disseisor make a lease for life or years, and after he and the disseisee join together to make a release to the lessee for life or years; this is a good release to enlarge the estate. But if the disseisor in this case make a lease for life or years, and the disseisee, or he that hath right, release to the tenant for life or years; in this case, the release is void for want of privity. And if there be lessee for years, the remainder for life, and he in reversion release to the lessee for years or to him in remainder for life, and his heirs, all his right; this is a good release to work an enlargement of estate. So if one make a lease for life, and grant the reversion for life, and then the lessor doth release to the grantee of the reversion and his heirs; this is a good release to enlarge the estate of the grantee, and here is privity enough. If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth release all his right to *B.* being in possession; this is a good release, and gives the fee simple.†

But if *A.* make a lease to *B.* for life, and the lessee maketh a lease for years, and after *A.* in the life-time of the tenant for life maketh a release to the lessee for years; this release is void, and will not enlarge his estate, for want of privity. So if a man make a lease for twenty years, and the lessee make a lease for ten years, and the first lessor doth release to the second lessee and his heirs; this release is void. So also if the donee in tail make a lease for his own life, and the donor release to the lessee and his heirs; this release is void. So also if the donee in tail make a lease for his own life, and after the donor release to the donee and his heirs; it seems this is not a good release. Also one joint-tenant or coparcener may release to another, and thereby transfer all his estate and give the whole interest unto his companion; and this is a good release to pass all his or her part of the land. And if there be three joint-tenants \* in fee, and they make a lease for life, and after two of them release all their right in the land to the third, this is a good release (1). So if one make a lease for life to another, and after

\* P. 326.

\* P. 327.

(1) A release being the proper mode of conveyance from one joint-tenant to another; and such joint-tenant not being capable of making a feoffment to his companion: see before in page 201, and note 3 thereto.—If one joint-tenant *grants, bargains, and sells*, or *gives, grants, and confirms* his estate unto his companion, either of these will operate as a release. 1 Vent. 78.—1 Sid. 452.

he grant the reversion to seven, and the tenant for life doth attorn, and after four of the seven release all their right to the other three, and after one of the three release to the other two; these are good releases. So if a lease for years be made to two, to begin at a day to come, a release by one of them to the other is good to give all the term and all the land to the releasee. But it seems one tenant in common cannot release to another tenant in common (1).

3 In respect  
of the words  
whereby it  
is made.

The fourth thing that is required in such a release is, sufficient words in law not only to make a release, (which is required in all releases) but also to raise and create a new estate. For this therefore know, that all releases (of what kind soever) are commonly made by these words, *remisisse, relaxasse, & quietum clamasse*, as being the most ancient and significant words to this purpose. And amongst these the word *release* is the most effectual word, as that which doth include the other two, and as that which is the proper and peculiar word for this kind of conveyance. But there are other words also by which a release may be made, as *renunciare, acquiescere, &c.* And therefore it is held that if one have common in another's land, and he by deed release it to him thus, *Renuntio communiam meam, &c.* this is a good release. And if the lessor do but grant to his lessee for life that he shall be discharged of the rent, this is a good release of the rent. And it is a rule, that by what words a debt or duty may be created, by words of a contrary signification it may be released. And therefore if one do acknowledge himself to be satisfied and discharged a debt, this is a good release of the debt (2). And for words to raise the estate, it is usual and most safe to specify in the deed what estate he to whom the release is made shall have; and in most cases this is needfull: for it is generally true, that when a release doth enure by way of enlargement of estate, no inheritance in fee-simple or fee-tail can pass without apt words of inheritance. And therefore if I make a lease of land to another for his life, and after I release to him all my right without more saying in the release; hereby his estate is not enlarged. But if I release to him and his heirs; by this he hath a fee-simple. And if I release to him and the heirs of his body; by this he hath an estate tail. But where a release worketh by way of *mitter le estate*, there in some cases there need not any words of inheritance; as in cases where releases are made between joint-tenants or coparceners; as where a joint estate is made to the husband and wife, and a third person and their heirs, and the third person doth \* release all his right to the husband alone, or to the wife alone.

\* P. 328.

So if there be three joint-tenants, and one of them doth release to one of the other two; in all these, and such like cases, there needs not any limitation of the estate, for the release is good without it (3).

(1) But they must pass their estate by feoffment, &c. because this estate being established by different notories, each having passed by distinct liverys, they must pass to each other by a distinguishing livery; or else it cannot be known, in whom such parts are, which formerly had passed by a distinct livery.

(2) See more amply, by what words a release may be made, in *Vin. Abr. Release (L.)*

(3) See more amply, as to releases which enure by way of enlargement of the estate, in *Com. Dig. Release (C.)—Vin. Abr. Release (B)—Bac. Abr. Release (C. 4.)* and therein of the modern manner of conveyancing by *lease and release*; for which, see also the note at the end of chapter 9. on Feoffment.

4) Co. super  
Lit. 2273.  
301.

9 H. 6. 35.  
Dier 116.  
Lit. sect.  
544.  
Co. super  
Lit. 264.  
Dier 307.  
Co. 9. 52.

Co. super  
Lit. 273.  
Lit. sect.  
465. 466.  
469.

Co. super  
Lit. 267.

Co. super  
Lit. 266.  
275.  
Lit. sect.  
448.  
1 H. 6. 4.  
Dier 302.



Lit. sect.  
466.  
Co. super  
Lit. 265.  
Co. 5. 70.  
71. 1. 111.  
8. 151.

In every good release in deed, that doth tend and enure to give, discharge, or extinguish, any right or title of lands, it is also further requisite,

1. That he that doth make it hath, at the time of the release made, some right or title to release. As where one doth disseise me of land, and I release to him all my right in the land; this is a good release. So if one disseise my tenant for life, and I (being the next in remainder, or reversion in fee) do release to him that did make the disseisin; this is a good release. So if the husband make a lease for life, and then take a wife and dieth, and the wife release her dower to him in reversion; this is a good release. And so also if after the marriage a man make a lease for life, the remainder in fee, and she release all her right to him in remainder in fee, or to him in reversion; this is a good release, and will bar her for ever.

2. When it doth enure by way of passing and extinguishment of a right or title only. 1. In respect of the estate of the releasor.

Lit. sect.  
446.  
Co. 10. 47.  
42. super  
Lit. 265.

But if the releasor have only a possibility of a right, or if a right happen to come to him after the release, this is not sufficient to make the release good. And therefore if the father be disseised, and the son before his father's death release all his right to the disseisor, and after the father dieth, so that the right doth descend; this is no good release to bar the releasor of his right. So if there be grandfather, father, and son, and the father disseise the grandfather, and make a feoffment, and the son release in the lifetime of his father, and after the father and grandfather die; this release in this case will not bar him. So if a lease be made for life, the remainder to the right heirs of I. S. and the lessee is disseised, and the eldest son of I. S. living his father, doth release to the disseisor; this release is void. So if the conusee of a statute, &c. do release to the conusor all his right in the land, this is void, and he may sue execution after notwithstanding. Or if the releasor have only a power, this is not sufficient to make the release good. And therefore if a man by his will devise that his executors shall sell his land, and dieth, and the executors release all their right and title in the land to the heir; this is void.

Co. 10. 57.

Co. 5. 70.

Co. super  
Lit. 265.

Co. super  
Lit. 267.

2. In all cases of a release of a bare right of a freehold in lands or tenements, he to whom the release is made, must at the time of the making thereof in any case have the freehold (in deed or in law) in possession or some estate in remainder or reversion (in deed and not in right only) in fee simple, fee tail, or for life, of the lands \* whereof the release is made; for rights of entry, and actions, and the like, are not to be transferred to strangers, but are thus to be released, and such releases are good. As if the disseisee release to the disseisor himself who hath the freehold in deed, or to the heir of the disseisor who hath the freehold in law, before his entry, or to the lessee for life of the disseisor; these releases are good. So if a disseisor make a lease to A. and his heirs during the life of B. and A. die, and the disseisee release to his heir before his entry; this is a good release.

2. In respect of the estate of him to whom the release is made.

\* P. 329.

Co. super  
Lit. 266.  
275.  
Lit. sect.  
448.  
1 H. 6. 4.  
Dier 302.

So if a fine *sur conusance de droit come ceo*, &c. or *sur conusance de droit* only (which is a feoffment on record) be levied; or if tenant for life, by agreement of him in the reversion, surrender to him in the reversion; or if a man do bargain and sell his land by deed indented and inrolled; or uses are raised by covenant on good considerations; in all these cases, the conusee, he in reversion, bargainee, and *cestuy que use*, have a freehold in law in them before

before entry. And therefore a release to them of the right of the land by him that hath it, is good, and will bar the releasor. But Lit. sect. otherwise it is in cases of exchange, partition, or upon livery 449. within the view; for, in these cases, no release is good until an actual entry made, for till then they have neither freehold in right nor law. So if a disseisor make a gift in tail, or lease for life or years, of the land, and keep the reversion, and then the disseisee or his heir release to the disseisor all his right; this is a good release to bar his right for ever. So if the heir of the disseisor be disseised, and the first disseisee do after release to him all his right; this is a good release to bar him. So if a donee in tail discontinue in fee, and the donor release to the discontinuee and die; this is a good release against the donor. So if the donee in tail be disseised, and after the donor release to the donee all his right, this is good: but in this case nothing of the reversion will pass by the release: for the donee had then nothing but a right. But if any rent be reserved on the estate tail, the rent is gone by the release. So if a lease be made to one for life rendering rent, and the lessee is disseised, and the lessor release to the releasee and his heirs all his right; in this case, albeit the rent be extinct, yet nothing of the right of the reversion doth pass. And yet if a woman that hath right of dower release to the guardian in chivalry; this is a good release, and her right or title of dower is gone. But if a disseisor make a lease for years, and the disseisee release to the lessee for years; this release is void, because he hath no freehold. But if he make a lease for life, and the disseisee release to the lessee for life, this is a good release. So also a release to the disseisor after the lease for years made, is good. And if lessee for years be ousted, and he in the reversion disseised, and the disseisor make a lease for years, and the first lessee release to him; this is a good release. Also in some cases a release made to one that hath neither freehold in deed, nor freehold in law, is good, when he hath an estate in reversion or remainder; as in the case before, where a release is made by the disseisee to the disseisor after he hath made an estate for life. So if the demandant in a real action release to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other besides the demandant, it is void. So if the tenant in a real action alien, hanging the *precipe quod reddat* against him, and after alienation the plaintiff release all his right in the land to him, this is a good release. So if a disseisor make a lease for life, the remainder to another for life, the remainder to a third in tail, the remainder to a fourth in fee, and the disseisee release to either of them in remainder; this is a good release. But if in this case tenant for life be disseised, and after he that hath right (the possession being in the disseisor) doth release to either of them in remainder; this is a void release. But in all the cases of a release of a bare right to him that hath an estate of a freehold in deed or in law, generally there needs no privity to make the release good: as in the cases before of a release made to the tenant for life of the disseisor, and them that follow. For if tenant for life make a lease to another for life of the lessee, the remainder over in fee, and the first lessor release all his right to him to whom the tenant made the lease for life; this

Extinguishment.

\* P. 330.

3 In respect of privity.

Co. super  
Lit. sect.  
Lit. sect.  
455, 456.

Co. super  
Lit. 265.

Lit. sect.  
448, 449,  
450, 451.  
Co. 8, 151.

Co. super  
Lit. 275.  
Lit. sect.  
470, 471.  
Co. 10, 48.

Co. super  
Lit. 277.  
Lit. sect.  
473, 470.  
471, 478.

9 H. 6. 4.

Co. 10, 4.

Co. super  
Lit. 265.

Co. super  
Lit. sect.  
467.

this is a good release and perpetual bar, albeit the release be not to him and his heirs. And so it is in case of a reversion.

If lessee for years be ousted, and he in the reversion disseised, and the disseisor make a lease for years, and the lessee that is ousted doth release to the lessee of the disseisor, this is a good release. And yet if the disseisee do release to the lessee for years of the disseisor, this is void.

If lessee for a thousand years be ousted by the lessor, and he make a lease for two years, and the lessee for a thousand years release unto him, this is a good release. But if a lessor disseise his lessee for life, and make a lease for a thousand years, and the lessee for life release to this lessee of a thousand years, this is void.

If one be disseised, and after another doth disseise him, and the disseisee release to the last disseisor, this is a good release. So if *A.* disseise *B.* who infeoffeth *C.* with warranty, who infeoffeth *D.* with warranty, and *E.* disseiseth *D.* to whom *B.* the first disseisee releaseth; this is a good release, and doth defeat all the mean estates and warranties. So if my disseisor lease for life, and the lessee for life alien in fee, and I release to the alienee all my right, &c. this is \* a good release and will bar me of my entry: \* P. 331. but if my entry be gone, as if I lease for life, and my lessee be disseised, and that disseisor is disseised, and I release to the second disseisor; in this case, the first disseisor may enter upon the second. So if my disseisor, in the case aforesaid, make a lease for life, and the lessee for life maketh a feoffment to two, and I release to one of the feoffees; this is a good release, and will bar me and my disseisor also. So if tenant for life let the land to another for the life of the lessee, the remainder to another in fee, and the lessor release to his tenant for life; this is a good release.

If one that hath a son within age be disseised and die, and the disseisor die seised, and the land descend to his heir, and a stranger abate, to whom the son when he comes of age doth release; this is a good release. So if one be disseised by an infant which doth alien in fee, and the alienee die seised, and his heir entreth, the disseisor being within age, and the disseisee release to the heir of the alienee; this is a good release. But where an inheritance or an estate for life is released to one that is but tenant for years, the release is not good without privity. And therefore if tenant for life, or in fee, release to the lessee for years of his disseisor; this is not good. But the release of a term of years to the lessee for years of him that doth eject him is good enough without privity, as in the case before.

But here note, that in cases of a void release of a right to an inheritance or free-hold, where there is a warranty contained in the deed, the warranty may be good, and be used by way of rebutter, albeit the release be void. As if the son of the disseisee release with warranty in the life-time of his father; or if there be grandfather, father and son, and the father disseise the grandfather, and make a lease with warranty and die; in both these cases, albeit the son be not barred by the release, yet he is barred by the warranty.

4. Such words as will make a good release in the cases of releases that enure by way of enlargement of estate, will make a good release in these cases. And note that this kind of release

4. In respect of the words whereby it is made,

Co. super  
lit. 277.  
lit. sect.  
473. 470.  
471. 478.

9 H. 6. 43.

Co. 10. 48.

Co. super  
lit. 265.

Co. super  
lit. sect.  
467.



lease is good without any limitation or specifying of the estate; for by a release of all a man's right without saying to have and to hold to him and his heirs, &c. in all the cases before, he that makes the release is barred of his right for ever; for if I be seised of an estate in fee by wrong, and he that hath right release to me all his right, albeit it be but for one hour, yet this is a good release for ever.

• P. 332. If there be Lord and tenant, and the Lord release to the tenant all his right that he hath in the feigniory, or all his right that he hath in the land, &c. this is a good release to extinguish the feigniory. And in this case there needs no words of inheritance or limitation; for by a release of all the right in the feigniory, the same is extinct for ever, without saying [to him and his heirs.] And yet in this case the Lord may by apt words release his feigniory to the tenant only in tail, or for life, and it shall be good so long. But if a Lord grant to his tenant, that he shall do his suit to another manor of the Lord's; or that the tenant shall give him yearly twelve-pence for his suit; this grant will not extinguish and determine the services or tenure.

7. What releases may be made of other things: and what shall be said a good release in deed of such things: or not: and by what words. Of a feigniory, rent-service, common, or the like.

If there be Lord and tenant, and the tenant be disseised, and after the Lord release all his right, &c. to the tenant; by this release the service or feigniory is extinct: for albeit a right regularly cannot be released to him that hath but a bare right, yet a feigniory may be released and extinct to him that hath but a bare right in the land. But if the tenant make a feoffment in fee, and then the Lord release all his right, &c. to the tenant; this is not good to extinguish the feigniory or services, but it will discharge all the arrearages.

If a rent-charge, common of pasture, or any other profit apprender, be issuing out of my land, and he that hath it doth release it to me; this is a good release and will extinguish it. But if I be disseised of the land, and have but a right at the time of the release made; the release is not good, as it is in the case of a rent-service and a feigniory. But if lands be given to me in tail, or for life, rendering rent, and I be disseised, and after the donor release to me all his right in the land; this is a good release and shall extinguish the rent. So if in this case where I am tenant in tail, and I make a feoffment in fee rendering rent, and after I release to the feoffee; this is a good release, and hereby the rent is extinct. And if two coparceners be of a rent, and one of them take the terre-tenant to husband, and after either of them release; these releases will be good (1).

If one disseise me of land, and then grant a rent-charge out of the land, and I, reciting the same, grant release to the grantee; this release it seems is good, and will bar me so, as after my re-entry I shall not be able to avoid it.

Of an advowson, &c. If two have the grant of the next advowson or avoidance of a church, before it be void one of them may release to the other, but afterwards they cannot.

Of a condition. If A. make a feoffment in fee, gift in tail, lease for life or years to B. on condition that upon such a contingent it shall be void: in this case, A. may, before the condition broken, re-

(1) In Co. Lit. 273. b. it is said, if two coparceners be of a rent, and the one of them taketh the terre-tenant to husband, the other may release to her, notwithstanding the rent be in suspense; and it shall enure by way of mitter l' estate, and she may release also to the terre-tenant, and that shall enure by way of extinguishment.

lease all his right in the land, or release the condition to *B*; and this will be good to make the estate absolute and to discharge the condition. So if a feoffee \* on condition make a gift in tail or lease for life, and after the feoffor release to the donee or lessee; this is a good release to discharge the condition. So if a copy-holder surrender to the use of another on condition, and this is presented to be without condition, and after the surrenderor doth release to him to whose use the surrender was made, all his right, &c. this is a good release, and doth extinguish the condition. But if a disseisor make a feoffment on condition, and the disseisee release to the feoffee on condition; howsoever this doth bar the right of the disseisee, yet it doth not discharge the condition.

Co. l. 112.  
113. 173.  
174.

Where a power or authority is such, that it doth respect the benefit of the lessor, as in the usual cases of power of revocation of uses, when the feoffor, &c. hath power to alter, change, determine or revoke the uses being intended for his benefit, and he release to any one that hath a freehold in possession, reversion, or remainder, by the former limitation; this is a good release, and doth extinguish the power, and make the estates that were before defeasible absolute, and it doth seclude him from any power of alteration or revocation. But if the power be collateral, or to the use of a stranger, and nothing to the benefit of him that makes the release: as if *A*. make a feoffment to *B* to divers uses, provided that *B*. shall have a power to revoke the uses, and *B*. release to any one of them that hath a use; this doth not extinguish the power; as it doth in case where the power is given to *A*. and *A* doth release it.

Of a power  
of revocation.

Bo Re-  
lease 86.  
21 H. 7. 29.  
Co. 5. 27.

If a feoffment be made with warranty, and the feoffee release the warranty; this doth extinguish it. And so it is of other warranties. But if tenant in tail release the warranty annexed to his estate tail, this doth not extinguish the warranty.

Of a war-  
ranty.

Any man may release any debt or duty due to himself. Also a man may discharge or release any thing due, or any wrong done, to his wife, before or after the marriage (1). And therefore if a trespass were done, or a promise were made, to my wife before the marriage, I may at any time during the marriage release this. So if any wrong be done, or obligation, statute, or promise made to her alone, or to her and me together, at any time during the marriage; I alone may release and discharge this. And if my wife be an executrix to any other man, I may release any debt or duty due to the testator.

Of debts and  
other duties  
personal.  
1. In respect  
of the per-  
sons.

Husband  
and wife.

*Milnes v. Milnes*  
3 TR. 327

Per Ch Jus-  
tice B. R.  
Mich. 17  
Jac.  
Co. 5. 27.

And if a legacy be given to a woman sole to be paid at Michaelmas next, and I marry her, and I release the legacy before the day; it seems by this, the legacy is gone (2).

An infant executor may release a debt duly paid unto him of the testator's debt. But if he release that which he doth

Infant.

(1) By the marriage the husband acquires such an interest in all debts due to the wife, that he may release them; and therefore the release of the husband is a good bar to a debt due before the coverture, *Rel. Abr. Release (D)*.

(2) If husband and wife be divorced *a mensa et thoro* and a legacy is left to the wife, and the husband release it, she is thereby barred; for the marriage continues, and the husband has all her right—*per Hist. 1 Salk. 115.*—and in the case of *Palmer and Trevor*, 1 *Vern. 261*, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme and took her receipt for it, yet on a bill brought by the husband, it was decreed not to be a good payment.—See further how far the husband's release shall bind his wife, in *Bac. Abr. Release (F)*—*Vin. Abr. Release (H)*—*Com. Dig. Release (E. 1)*.

\* P. 334. not \* receive, it is a void release (1). And regularly the release of an infant is void (2).

2. In respect of the time. An executor before probate of the will may release a debt or duty due to the testator; and this release is good to bar him (3). Co. 5. 27. 9. 39.

A future or contingent promise may be released and discharged before the contingent happen. Trin. 4 Jac. in Elton's case.

A debt on an obligation, or rent, may also be released before the day of payment as well as after, but not by the same words. And therefore if one promise to I. S. that upon the surrender of I. S. he will pay him an hundred and ten pound, and after the promise and before the surrender he release this debt; this doth discharge the debt. But if the promise be that if the surrenderee shall sell the land, and shall have five hundred pounds, that then he shall pay the surrenderor an hundred pounds more, and the surrenderor before sale release this sum; this is no discharge of it. And yet a release of the promise is a discharge of it. And if A. promise to me, that if I. S. do not pay to me an hundred pounds i *Octobris*, that he doth owe me, that A. will pay me the hundred pounds i *Novembris*, and I to *Septembris* release to him this debt, or all actions and demands; in this case, this release is not good to discharge this promise. But by a release of the promise, the same is discharged. Hil. 16. Jac. B. R. Brisco versus Heires.

Of actions. If a man release to another all actions, and do not say further which he hath against him; this is as good a release as if these words were inserted: *quod necessario subintelligitur non deest* (4). Bro. Re. leaf 29.

And all these releases must be made by apt words, and such as the law shall judge sufficient for that purpose. Co. 9. 53.

And in all these cases care must be had there be no mistakes: for mistakes will make releases and confirmations void as well as other grants. And therefore if A. make a release to B. in this manner; *Noveritis, &c. me A. de B. remisisse, &c. B. omnes actiones quas idem B. habet versus A.* whereas it should be *quas idem A. habet versus B.* this release is void (5). Bro. Re. leaf 56. 58.

8. What shall be said a release in law: or not: and how. If there be Lord and tenant, and the Lord purchase the tenancy; by this means the services are released and extinct in law. And if the Lord disseise his tenant, and make a feoffment in fee by deed or without deed; this is a release in law of the feignory. Co. super Lit. 264.

Of a feignory. If a disseisee disseise the heir of the disseisor, and make a feoffment with or without a deed; this is a release in law of the right in fee. And if he make a lease for life, this is a release in law of the right, so long as the lease doth last. Co. Idem. Lit. 275. 290. 267. 268. Co. 8. 15.

(1) See accordingly *And. 117, Russell v. Pratt S. C. Mo. 146*, says, that *Plowden* was strong in opinion against the judgment, but *Wray C. J.* said to him, "that he had conferred with all the Justices of England and they had agreed to give judgment for the infant, because, the release being without consideration, the infant would charge himself in a *devastavit*."—*S. C.* cited in *Roll. Rep. 336*."

(2) Or voidable: see before, with respect to deeds made by infants, in page 7, 54, 232, and the references in the notes thereto.

(3) See accordingly in *Plow. 281*.—*Co. Lit. 292. b.* and more amply as to releases by executors and administrators, in *Went. Office of Ex. 33*.—*Bac. Abr. Release (E.)—Com. Dig. Administration (B. 9.)*

(4) A release of all actions, discharges a bond to pay money at a certain day to come, for it is *debitum in presenti, quoniam sit solvendum in futuro*; and albeit no action lieth for the debt, yet because the right of action is in the releasor, the release of all actions is a discharge of the debt itself, *Co. Lit. 292. b.*—by a release of all actions, actions real, personal, or mixt are discharged, *Com. Dig. Release (E. 3.)*—see further in *Bac. Abr. Release (I. 2.)—Vin. Abr. Release (P.)*

(5) As to mistakes and misrecitals in releases, see *Bac. Abr. Release (L.) Vin. Abr. Release (L. 3.)*



Co. super  
Lit. 264.  
8 E. 4. 3.  
21 E. 4. 2.

\* If a creditor, as an obligee, or the like, make a debtor, as \* P. 335.  
the obligor, &c. his executor; by this means the action is released Of a right  
by act of law, and yet the duty remains still, for the executor may of action.  
retain so much of the goods of the testator. And if the creditor be Executor.  
a woman, and she marry with the debtor; by this the debt is re-  
leased in law. And if there be two obligees or debtors, and one of  
them, being a woman, is married to the obligor; this is a release  
in law of the debt, albeit the creditor be an infant (1).

M. 30 &  
31.  
El. B. R.  
Adjudged  
Co. 8. 136.  
Co. 61. 5.  
5. 22. Bro.  
Releases 84.  
94 Stat.  
23 H. 8.  
ch. 3.

But if there be a woman executrix to the debtor, and she take  
the debtor to the husband, this is no release in law (2).  
And if an obligor be made administrator of the goods and chattels  
of the obligee; this is no release in law (3).

Where divers join in any suit or action to recover any personal  
thing of which they are to have the joint benefit or interest, when  
the law doth not compel them to join, there the release of one of  
them shall bar all the rest. And therefore if two men join in an ac-  
tion of debt, trespass, or the like, and one of them alone doth re-  
lease to the defendant; this is a bar to the other plaintiff also. So if  
a statute or an obligation be made to two or more, and one of them  
release it to the creditor or obligor; this is a discharge of the whole  
duty, and a bar to the rest, so that they can make no use of the sta-  
tute or obligation. But if divers be charged in an action, and they  
for the discharge of themselves only join in a suit or action, where  
also they can do no otherwise, being compelled by law to join; in  
this case, the release of one of them shall not hurt the others. And  
therefore if divers join in a writ of error, attain, or *audita querela*,  
and one of them release to the defendant in the writ; this will not  
bar the rest of their remedy, but they may go on in their suit not-  
withstanding.

9. The force  
and virtue  
of it: and  
how it shall  
enure and  
be construed  
and taken.  
1. In respect  
of the per-  
sons: and  
where a re-  
lease made  
by one shall  
bind ano-  
ther: and  
where not:  
and where a  
release  
made to  
one, shall  
enure to  
another: or  
not.

26 H. 7. 4.

If there be two or more executors, and one of them alone release  
a debt or duty to the testator before judgement in a suit, had by  
all the executors against the debtor, this will bar all the rest. But  
otherwise it seems it is after judgement had

Executors.

Co. super  
Lit. 205.  
Lit. sect.  
452. 470.  
Co. super  
Lit. 275.  
200. 267.  
268.  
Co. 8. 151.

If a writ of ward be brought by two, and one of them release;  
this shall not bar his companion, but shall enure to his benefit; for  
hereby he shall have the whole ward.

A release made to the tenant in tail, or for life, of the right to  
the land, shall avail and enure to him that hath a reversion or re-  
mainder in deed. And so *e converso*, a release made to him  
that hath a remainder or reversion will avail and enure to the  
benefit of him that hath the estate tail for life, or years prece-  
dent. As if a disseisor make a lease for life, and the disseisor  
\* release to the tenant for life; this shall enure to the disseisor. \* P. 336.

So if he, or a tenant for life, make a lease for life, the remainder

(1) See accordingly 1 *Salk.* 306.—8 *Co.* 136.—If an infant at the age of seventeen years makes his de-  
btor executor, it is a release in law; for as the law gives him power to make an executor, it gives his ex-  
ecutor the same advantages with others, *Co. Lit.* 264.

(2) Because she hath the debt in another right; and if this amounted to a release in law, it would be  
a *disseisor*, which is a wrong the law will not suffer, *Co. Lit.* 204.—in *Croffman v. Reade*, *Cro. Eliz.*  
114. it was adjudged that by the intermarriage the debt which the executrix had *in autre droit*, was not  
extinct but suspended, and that after *Baron's* death an action would lie against his executor.—A similar  
distinction is made in the law of Merger, where different terms for years happen to vest in the same per-  
son in different rights.

(3) See accordingly 1 *Wood* 697.—and more amply in what cases a release by operation of law is  
created, and the effect thereof, in *Vin. Abr.* Release (L. 2.)—*Bac. Abr.* Release (B.)—*Com. Dig.* Release  
(A. 2.)

for life, the remainder in tail, the remainder in fee; and the disseisee or first lessor doth release all his right to any of them in remainder; this shall enure unto and benefit all the rest. And if the husband make a lease of his wife's land to one for life, the remainder to another in fee, and the wife after his death doth release all her right in the land to him in remainder; this shall enure to the lessee for life.

If a disseisor make a lease for life, and the disseisee release all his right to the tenant for life; this shall enure to the benefit of the disseisor. But if the disseisee release no more to the tenant for life, but all actions; this release will not benefit him in remainder, or reversion, after the death of the tenant for life.

If a disseisor make a feoffment to two in fee, and the disseisee release to one of the feoffees, this shall enure to both.

If tenant in tail be disseised by two, and he release to one of them, this shall enure to both. But if the King's tenant be disseised by two, and he release to one of them; this shall not enure to the other. So if two joint-tenants make a lease for life, and then disseise the tenant for life and he release to one of them; in this case, his companion shall have no benefit by it.

If tenant in fee-simple be disseised by two, or two do abate or intrude, and he doth release to one of them; the other shall have no benefit by this. But if tenant for life do, after a disseisin done to him, release to one of the disseisors; this shall enure to both.

And if two disseisors be, and they make a lease for life, or years, and after the disseisee doth release to one of the disseisors; this shall enure to them both, and to the benefit of the lessee for life also.

And if lessee for years be ousted, and he in reversion disseised, and the lessee release to the disseisor; the term of years is hereby extinct, and the disseisee may take advantage of it and enter presently.

But if two joint-tenants in fee be disseised by two disseisors, and one of the disseisees release to one of the disseisors all his right; this shall enure to the other, for this extendeth but to a moiety.

If a release be made by a woman of her dower to the guardian in chivalry; this shall enure to the heir, and he may take advantage of it.

\* P. 337. If tenant for life be disseised by two, and he in the reversion and the tenant for life join in a release to one of the disseisors; this shall not enure to the other. But if they do severally \* release their several rights, their several releases shall enure to both the disseisors.

If a mortgagee upon condition, after the condition broken, he be disseised by two, and the mortgagor that hath the title of entry, doth release to the one disseisor; this shall enure to both. And like law is for an entry for mortmain, or a consent to ravishment, &c.

If there be Lord and two joint-tenants, and the Lord release to one of them; this shall avail his companion.

If tenant in fee simple make a feoffment in fee, and after the Lord release to the feoffor, this shall not enure to the feoffee to extinguish the feignior. But if he release to the feoffee, this shall enure to the feoffor to extinguish the feignior.

If

Co. super  
Lit. 279.

If there be Lord and tenant, and the tenant make a lease for life, the remainder in fee, and the Lord release to the tenant for life; the rent is hereby wholly extinguished, and he in remainder shall take advantage of it: as when the heir of a disseisor is disseised, and the disseisor makes a lease for life, the remainder in fee, and the first disseisee doth release to the tenant for life; this shall enure by way of extinguishment to him in remainder, viz. to the lessee for life first, and after to him in remainder.

Co. super  
Lit. 267.

If two tenants in common of land grant a rent of forty shillings out of it, and the grantee release to one of them; this shall not enure to the other. But if one be tenant for life of lands, the reversion in fee to another, and they join in the grant of a rent out of the lands, and the grantee release either to the tenant for life, or to him in reversion; this shall enure to the other, and extinguish the whole rent.

Co. super  
Lit. 267.

If two men gain an advowson by usurpation, and the right patron release to one of them; this release shall enure to them both.

Co. 51. 59.  
super Lit.  
232.  
Lit. sect.  
376.

If two be bound jointly and severally in any obligation, or other specialty, and the obligee, &c. release to one of them; this shall enure to discharge the other also, if it be a good release as to him that makes it. But otherwise it is in case of a release made by the King. Prerogative.

And if two do a trespass to another together, and he to whom it is done doth release it to one of them; this shall enure to discharge the other. The husband and wife.

Dier 319.  
Co. super  
Lit. 273.  
276.  
14 H. 8. 6.

If husband and wife, and I. S. purchase to them and the heirs of the husband, and after I. S. release all his right in the land to the husband; the wife shall have no benefit by this, but it shall enure to the husband alone.

And if there be two women joint disseisereesses, and the one take a husband, and the disseisee release to the other; in this case, \* P. 338. the husband and wife shall take no benefit by this. And if the disseisee release to the husband, this shall enure to him and his wife and the other woman.

And if one that hath a rent out of my wife's land release it to me and my heirs; this shall enure by way of extinguishment, and my wife will have advantage of it. And yet if the words be [grant and release] the rent to the husband and his heirs, in this case the husband may take as a grant if he will.

Co. super  
Lit. 232.

But here note in all these cases of releases, when one man will take advantage of a release made to another, he must have the release to shew and plead. Note.

Co. 10. 51.  
22 H. 6. 1.

If I be disseised, and I release to the disseisor all actions I have or may have against him; this is but personal, and shall not be expounded to bar my heir after my death of his remedy; neither will it bar me of my remedy against his heir after his death.

Co. 8. 153.

5. 28. 70.

Kelw. 113.

Co. super

Lit. 246.

290. 292.

289.

Lit. sect.

494. 505.

506. 512.

513.

Bro. Rat.

39.

So if I deliver goods to another, and afterwards I release to him all actions, and then he die; by this I am not barred so, but I may sue his executors.

See more in *Confirmation, chap. 18. numb. 7.*

A release of all actions, without any more words, is better than a release of all actions real only, or a release of all actions personal only: for by a release of actions, or a release of all manner of actions, without more words, are released and discharged all real, personal, and mixt actions then depending, and all causes of

2. In respect  
of the thing  
released.  
Of all actions.



of suit for any real or personal thing ; as appeals for the death of an ancestor, conspiracies, suits by *Scire facias* to have execution of a judgment, detinue for charters.

And if two conspire to indict me; and I release to them all actions, and after they go on with their conspiracy ; by this release I am barred to do any thing against them. By this release also of all actions, a debt due to be paid upon a statute or an obligation at a day to come, albeit the release be before the day, is discharged ; and by this also the statute itself if it be at any time before execution is discharged.

And if one be to pay forty pounds at four days, and some of the days are past, and some to come, and the debtee make such a release ; by this the whole debt is discharged.

Also in a *Scire facias* upon a fine or a judgment, this release is a good plea in bar.

But this release of all actions will not discharge executions, or bar a man of taking out of executions, except it be where it must be done by *Scire facias* ; neither will it discharge or bar a man of suits by *audita querela*, or writ of error to reverse \* an erroneous judgment ; neither will it discharge covenants before they be broken ; nor will it discharge any thing for which the lessor had no cause of action at the time of the release made ; as if a woman have title of dower, and do release all actions to him that hath the reversion of the land after an estate for life ; or a man is by an award to pay me ten pounds at a day to come, and before the time I make such a release ; or I make a lease rendering rent, or an annuity is granted to me, and, before the rent-day, I make the lessee or the grantor such a release ; in these cases, and by a release in these words without more, the dower, debt, rent, or annuity, is not discharged.

And if a man have two remedies or means to come by land, as action and entry ; or by goods, as action and seisure, or the like ; in this case, by a release of all actions he doth not bar himself of the other remedy. *Et sic è converso*.

And if a man doth covenant to build an house, or make an estate, and, before the covenant broken, the covenantee doth release unto him all actions ; by this the covenant itself is not discharged. And yet, after the covenant is broken, this release will discharge the action of covenant given upon that breach (1).

Of all right. By a release of all a man's right in any lands or tenements, without more words, is released and discharged all manner of rights of action, and entry, the releasor hath to, in, or against the land, for there is *jus recuperandi, prosequendi, intrandi, habendi, retinendi, percipiendi, possidendi*, and all these rights whether they accrue by time, feoffment, descent, or otherwise, are extinct and discharged ; so that if the releasee have gotten into the land of the releasor by wrong, by this release the wrong is discharged, and the releasee is in the land by good title.

Also by this release are discharged and released all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an estate for life, and make such a release to him in reversion, this doth bar her.

(1) See further as to a release of all actions in the references before in note 4 to page 330.

By such a release also from the Lord to the tenant, the services are extinct.

Co. 10. 47.  
super Lit.  
289.

But this release will not bar a man of a possibility of a right that he hath at the time of the release, or of a right that shall descend to him afterwards. And therefore if the conferee of a statute, before execution, release all his right in the land to the terre-tenant; or the heir of the disseisee, in the life-time of his father, do release to the disseisor all his right; these releases do not bar them. Nor will this release bar a man of an *audita querela*, and such like things. And yet if the tenant in a \* real action, after the demandant hath recovered the land, release to him all his right in the land; this doth bar him of a writ of error, for any error in the proceeding in that suit. \* P. 340.

Co. super  
Lit. 150.  
Dier 157.

And if there be Lord and tenant by fealty and rent, and the Lord, by his deed reciting the tenure, doth release all his right in the land, saving his said rent; by this release the right of the seignior, save only of the seignior of the rent and fealty, is extinct. And if the Lord release to his tenant all his right to the land and seignior *salvo sibi dominio suo*, &c. hereby the services only, not the tenure is extinct.

Perk. fecit.  
644.

And if one have a rent charge out of my land, and make such a release of all his right in the land to me that am the terre-tenant, without exception of the rent; hereby the rent is extinct and gone for ever (1).

Kelw. 484.  
6. 7. 8.  
Co. super  
Lit. 265.  
345.

By a release of all a man's title unto lands or tenements, without more words, is released and discharged as much as is released by the release of all a man's right, and both these releases have the like operation: For howsoever title strictly and properly is where a man hath lawful cause of entry into lands whereof another is seised, for which he can have no action, yet it is commonly taken more largely, and doth include a right also. And *titulus est justa causa possidendi quod nostrum est*. Of all title.

Co. 8. 151.

By a release of all entries, or rights of entry, a man hath into lands, without more words, a man is barred of all right or power of entry into those lands upon any right whatsoever. And if a man have no other means to come by the land but by an entry, and he hath released that by these words; he is barred for ever. But if one have a double remedy, *viz.* a right of entry, and an action to recover his right by, and then release all entries; by this he is not barred of his action. Of entry or right of entry.

Lit. fecit.  
492. 493.  
495.  
Co. 8. 151.  
Lit. fecit.  
115. 500.  
Co. super  
Lit. 288.  
289.

By a release of all actions real, without more words, are discharged all real and mixt actions then depending, and all causes of real. And therefore all causes of suing of assises, writs of entry, *Quare impedit*, actions of waste, and the like, which the party hath at the time of the release made, are hereby discharged. But this release will not bar him that doth make it of any causes of action that shall arise and accrue afterwards. Neither will it bar him of an appeal of death or robbery, writ of error, or any such like thing: nor of any thing which a release of all actions will not bar. And yet when land is to be restored or recovered by judgement in a writ of error; this release is a bar to the writ of error. So if a judgement be given upon a false verdict in a

(1) See more amply as to the operation of a release of all right, in *Gen. Dig. Release* (E. 2.)—*Fin. Abr. Release* (T).

real action, a release of all actions real is a bar in an attainder.

Of actions personal.

\* P. 341.

\* By a release of all actions personal, without more words, are discharged all personal actions then depending, and all causes of personal actions wherein a personal thing only is to be recovered, and therefore hereby are discharged all causes of suing out of actions of debt, trespass, detinue, or the like. Also all mixt actions, as actions of waste, *Quare impedit*, an assise of novel disseisin, writ of annuity, appeal of maihem, and the like. Bro. Release 47. Co. super Lit. 285. 9 H. 6. 57. Lit. sect. 501.

And if debt, &c. or damages be recovered in a personal action by false verdict, and the defendant bringeth a writ of attainder; or if a writ of *Audita querela* be brought by the defendant in the former action to discharge him of execution; by this release, the defendant in both cases is barred of his suit. Co. super Lit. 209.

Also when by a writ of error the plaintiff shall recover or be restored to any personal thing only, as debt, damage, or the like; as if the plaintiff in a personal action recover any debt, &c. or damages, and be outlawed after judgement; in this case, in a writ of error brought by the defendant upon the principal judgement, this release will bar him. But where by a writ of error the plaintiff shall not be restored to any personal or real thing, this release is no bar: as if a man be outlawed in an action personal by process upon the original, and bring a writ of error, and then release; this is no bar to him. Co. super Lit. 288. Lit. sect. 503.

If a man by wrong take or find my goods, or they be delivered to him, and I release to him all actions personal, notwithstanding this release, I may in this case take my goods again, albeit I be barred of my action by this release (1). Neither is this release a bar in an appeal of robbery or death. Neither will it bar in any case where a release of all actions will not bar. Neither is it any bar to an action of debt brought for an annuity granted for a term of years for any arrears that shall grow due after the release. Nor for any rent, or sum of *nomine penæ*, when the release is before the day of payment, or *nomine penæ* happen. Neither is it a bar in real actions wherein damages are recoverable only by the statute, and not by the common law, as in a writ of dower, entry, *sur disseisin in le per*, *Mordancester*, *Aile*, &c. (2). Co. super Lit. 291. Fitz. Audita Querela 3.

Of debts.

By a release of all debts without more words, are discharged and released all debts then owing from the releasee to the releasor upon especialties, or otherwise, all debts due also upon statutes. And therefore if the conusor himself, or his land, be in execution for the debt, and he hath such a release, he must be discharged: and so he cannot be upon a release of all actions.

Of duties.

By a release of all duties, without more words, is a releasor barred and the releasee discharged of all actions, judgements, and executions, also of all obligations. And if the body of a man be in execution, and the plaintiff make him such a release; hereby he shall be discharged of execution; because the duty itself is discharged. And if there be rent or services behind to the Lord from his tenant, and the Lord make such

(1) See accordingly, *Skin. 57. Foot v. Rastall.*

(2) See further what things shall be released by a release of actions personal, in *Vin. Aile*, Release (R).



a release to his tenant; by this it seems the arrearages are released.

Co. 8. 154. This word is of a somewhat more large extent than actions; for Of suits.  
157. 5. 70. by a release of all suits, without more words, is released and dis-  
super Lit. charged as much as by a release of all actions. And hereby also  
291. are discharged all executions in the case of a subject. But in the Prerogative,  
case of the King it doth not release executions. And this doth not  
release a covenant before it be broken (1).

Co. super. By a release of all quarrels, without more words, all actions real Of debates,  
Lit. 292. 8. and personal, and all causes of such actions, are released and dis- quarrels,  
157. 5. 70. charged. So likewise by the release of all controversies, or by the controversies.  
release of all debates. But this will not bar the releasor of any  
causes of suit that shall arise after, and were not at the time of the  
release: as the breach of a covenant which shall be after, albeit  
the covenant be before, is not discharged hereby.

Co. 1. 112. By a release of all covenants, without more words, all cove-Of cove-  
10. 51. nants then broken, and all that shall be after broken, but were nants.  
super Lit. then made and in being, are discharged. *Qui destruit medium*  
292. *destruit finem.*

Adjudged. And therefore if a lessee do covenant to leave a house, leased to  
Hil. 4. Jac. him, at the end of the term, as it was at the beginning of the  
B. R. term, and the lessor before the end of the term release to the lessee  
Hancock's all covenants; this doth discharge the covenant. But this release  
case. doth discharge nothing else but covenants (2).

Co. 10. 47. By a release of all statutes from the conusee to the terre tenant, Of statutes.  
without more words, the statute is discharged. And yet if he re-  
lease all his right in the land of the conusor; this will not dis-  
charge the land of execution.

Co. 2. 16. By release of all errors and writs of error, all errors and writs Of errors.  
Lit. sect. of error, and that before they be brought, are extinct and discharg-  
503. ed. And if a man be outlawed in a personal action by process up-  
on original, and make such a release; this will bar him.

Lit. sect. By a release of all warranties or covenants real, all warranties Of warran-  
148. then made and in being, are for ever discharged. ties.

Co. 10. 51. By a release of all legacies without more words, a man doth Of legacies.  
Dier 56. bar himself of all the legacies given him *in presenti* or *futuro*; so  
Co. super. that if he be to have a legacy at twenty-four years old, and at  
Lit. 76. twenty-one years of age he release to the executor all legacies or  
this legacy in particular; this is a bar to him of this legacy for  
ever. \* And yet a release of all demands in this case is no dis- \* P. 343.  
charge of his legacy.

Co. super. By a release of rent, the rent is extinct and discharged, whether Of rent.  
Lit. 292. the day of payment be come or not. But a release of all actions  
will not discharge a rent before the day of payment come.

Adjudged. By a release of all promises or *assumpsits*, without more words, Of promises.  
Hil. 16 Jac. a man may bar himself of a contingent or future thing, that by  
B. R. other words could not be released: as if a man promise to me,  
Briscoe v. that if I. S. do not pay me one hundred pounds the tenth of  
Heires. *March* next, that he will pay it me the twentieth of that month,  
Co. 10. 51. and before the time I release him to all actions and demands, this

(1) By a release of all suits a man is barred of a writ of error.—*Cole's Case*, *Latch* 110.

(2) A release of all covenants until such a day, is no discharge of covenants which were broken before; for being broken before, there was no covenant as to them; per *Hobart J. Hutt*. 17. *Smith v. Stafford*.  
—See more amply what shall be deemed a release of covenants in *Vin. Abr.* Release (U. 5.)—*Cim. Dig.*  
Release (E. 4).

will not discharge the promise. But if I release to him all promises, this will bar me. *Et sic de similibus* (1).

Of judgments.  
Of executions.

By a release of all judgments, without more words, is he that maketh it barred of the effect of any judgment he hath against the releasee; for if execution be not taken out, he is now barred of it. And if the releasee, or his land, &c. be in execution, he and it shall be discharged thereof by *Audita querela*. And by a release of all executions, without more words, a man is barred of taking or having out of any execution upon any judgment either before *scire facias* or after. But if after execution be made by *Capias ad Sat. Elegit*, or *feri facias*, the plaintiff release to the defendant all executions, he cannot plead such a release, but he must have an *Audita querela*; and that he may have to discharge him of execution (2).

*Audita querela.*

Of appeals.

By a release of all appeals, are discharged all appeals of felony, of death, of robbery, of rape, of burning, of larceny depending, and all causes not yet moved also.

Of advantages.

By a release of all advantages, it seems actions of debt upon account are discharged.

Of conspiracies.

By a release of all conspiracies, all conspiracies past are discharged, and such also as are only begun and shall be prosecuted and perfected after the release, are likewise hereby discharged.

Of forgeries.

By a release of all forgeries before publication, the forgery is discharged but not the publication, and therefore the releasor may take his remedy for that notwithstanding.

Of demands or claims.

A release of all demands is the best release of all, and this word is the most effectual word of all, and doth in deed include and comprehend within it most of all the releases before (3). By a release therefore of all demands, without more words, are released all rights and titles to land, warranties, conditions annexed to estates before they be broken or performed and after they be broken.

- \* P. 344. Also by this release, are released and discharged all statutes, obligations, contracts, recognisances, covenants, rents, commons, and the like. Also all manner of actions, real and personal, appeals, debts, duties. Also all manner of judgments and executions. Also all annuities, and arrearages of annuities and rents. And therefore if a man have a title of entry by force of a condition, &c. or a right of entry into any lands; by such a release, the right and title is gone. And if a man have a rent-service, rent-charge, estovers, or other profit to be taken out of the land; by such a release to the tenant of the land, it is discharged and extinct.

(1) With respect to promises by one person for another, it is enacted by the 4th. *sect.* of the *stat. 19 Car. 2. c. 3.* That no action shall be brought, whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; unless the agreement upon which such action shall be brought, or some memorandum, or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

(2) See fully by what words executions may be released; and what is released by the words all executions; in *Vin. Abr.* Release (U. 3).

(3) If a common person releases all demands, this extends to inheritances, rents, right of entry, &c. for all these are implied in demands; but if the King releases all demands, or pardons them, this does not extend to any inheritance. *Br. Abr.* Charters de pardon pl. 67. Releases pl. 44. 90.

Adjudg  
B. R. F.  
17. Jac  
Wotton  
case.

Co. 5

Hil. 4 J  
B. R.  
Hancoch  
case adj  
ed.

Hil. 6 J  
B. R. B.  
cher and  
Hudson's  
case.

Co. super  
Lit. 267

19 H. 6.

Bro. Rele  
31. 29.

Co. super  
Lit. 280.

Perk. sect  
71.  
Bro. Rele  
85.  
9 E. 3.

Bro. Rele  
65.

(1) See  
Bac. Abr.  
(2) In  
intention  
Raym. 130

Adjudget  
B. R. Pasc.  
17. Jac.  
Wotton's  
case.

And therefore if a termor for years, grant the land by indenture to *A.* rendring rent, and at the end of the first year he release to the grantee all demands; the rent is hereby extinct during all the time. And a release of all claims it seems is much of the same nature.

Co. 5. 70.

But by a release of all demands, or of all claims, is not released any such thing as whereof a release cannot be made, as a meer possibility, or the like.

Hil. 4 Jac.  
B. R.  
Hancock's  
case adjudg-  
ed.

Neither will this release discharge a covenant or promise that is future and contingent before it be in being; nor a covenant before it is broken: and therefore if the lessee of a house covenant to leave it as well in the end of his term, as it was in the beginning of his term, and before the end of the term the lessor release to the lessee all demands: this is no bar to an action brought for a breach of the covenant afterwards.

Hil. 6 Jac.  
B. R. Bel-  
cher and  
Hudson's  
case.

And if a man, in consideration of a sum of money given to him by a woman sole, assume to her that if she marry one *M.* that he will pay to her after the death of *M.* one hundred pounds by the year if she survive him, and she marry him, and the husband release all demands and then die; this is no bar to the duty. So if one promise a woman that if she will marry him, that he will leave her worth one hundred pounds if she do survive him, and before the marriage he release to him all actions and demands; this doth not discharge the promise (1).

And note that all these words are of the same force, when they Note.  
are joined with other words, as when they are alone.

Co. super  
Lit. 267.

If two tenants in common of land, grant a rent-charge of forty shillings out of it to one in fee, and the grantee release to one of them; this shall extinguish but twenty shillings; for that the grant in judgment of Law is several.

19 H. 6. 4.

If one have several causes of action against two, and make a joint release to them: this shall be taken to be a release of all joint and several causes of action.

Bro. Release  
31. 29.

\* So if an executor have some cause of action for himself, and \* P. 345.  
some for his testator, and he release all actions, indefinitely; this release doth discharge both sorts of actions (2).

Co. super  
Lit. 280.

If the tenancy be given to the Lord and a stranger, and to the heirs of the stranger, and the Lord release to his companion all his right in the land; this shall enure not only to pass his estate in the tenancy, but also to extinguish his right in the Seignior.

Perk. sect.  
71.  
Bro. Release  
85.  
9 E. 3.

If there be Lord and tenant of two acres, and the Lord release all his right in one of them to the tenant; hereby the services are extinct for both. So if one have a rent-charge out of twenty-acres, and release all his right in one acre; hereby all the rent is extinct. And yet if *A.* lease white-acre to *B.* for life, rendering rent, and afterwards doth release part of the rent; this is good only for such part.

Bro. Release  
65.

If I be seised of land in fee, and I make a lease of it to one for life, and after I release all my right in the land for the life

(1) See accordingly 1 *Wood* 712.—and more amply as to the operation of a release of all demands, in *Bac. Abr. Release* (1)—*Vin. Abr. Release* (U.)

(2) In *Bac. Abr. Release* (E.) it is said, but yet in some cases such general words may according to the intention of the parties be restrained.—see the case of *Hutchinson v. Savage*, as to this point, in 2 *Ld. Raym.* 1306,



of the tenant for life, so as neither I nor my heirs shall have, claim, or challenge, any thing or right in that land for the life of the tenant for life; by this release, nothing is extinct or discharged, but the causes of action of waste that were then, and not any cause Dier 307. that shall happen afterwards.

If a statute be entered into the twentieth of *April*, and the co-Per Justice nusee by a release dated the nineteenth of *April* (meaning to except Dodridge this statute) doth release all debts and demands till the making of Trin. 14. the release; by this release the statute is discharged: But if the Jac. Co. 9. 53. words had been to the day of the date of the release, *contra*.

If a promise be of two parts, and he to whom it is made doth release one part, it seems this is a release of both.

If *A.* 1st. *Jan.* enter into an obligation of forty pounds to *B.* and *B.* 13th. *July* make a deed thus, it is agreed between *B.* on the one part, and *A.* on the other part, that upon good considerations *B.* doth acknowledge himself fully satisfied and discharged of all bonds, debts, or demands whatsoever, from the beginning of the world to this day by the said *A.* and that he the said *B.* is to deliver all such bonds as he hath yet undelivered to *A.* except one bond of forty pounds yet unforfeited, which is for the payment of, &c. which was the obligation before: in this case it was adjudged a good release and discharge of all the bonds excepting that one, and that this exception shall go to all the premisses.

3. In respect of the time or estate.  
\* P. 346.

A release of a right, or of an action, cannot be for a time, but Lit. sect. 467. 470. it will be for ever. And therefore if a release be made to any Co. super Lit. 273. 264. 280. Kelw. 88. Co. super Lit. 9. \* one that hath a fee-simple by wrong, by him that hath the right, for one hour, one year, for life or years; this is a good release for ever.

And if the disseisee release all his right in the land to the disseisor without naming his heirs, or setting down any time how long the releasee shall have the land or the right of the disseisee therein; this is a good release for ever, and doth make the estate of the disseisor good for ever, and so doth make a good estate in fee-simple without these words [his heirs, &c.] And if the disseisor or his heir make a gift in tail, or a lease for life, and the disseisee release all his right to the donee or lessee for life, to have and to hold for life only; this is a good release of his right for ever.

But if the disseisee do disseise the heir of the disseisor, and make a lease to him for life (which is a release in law); by this the right is released during that time only. So if one joint-tenant or parcener release to the other, all his right in the land, without the words [heirs] or any more words: this release doth give to his companion his whole interest for ever. And when the Lord, or grantee of a rent, release to the tenant, or terre-tenant generally; by these releases, a fee-simple is transferred without any words of his heirs, &c. And yet the Lord may release his feignory to his tenant, to hold to him in tail or for life, and this shall be taken and enjoyed accordingly. But if the Lord doth release the feignory to his tenant without any words of heirs put in the deed, the same is extinct.

And if I let land to a man for term of years, and after I release Lit. sect. 545. 546. to him all my right which I have in the land, without using any 465. other words in the deed; or release to him, to have and to Plow. 556. hold Dier 263.

Lit. sect. 549.

Lit. sect. 606. 610. 24 E. 3.

Co. super Lit. 273.

Lit. sect. 426. Co. super Lit. 299. 300.

Co. super Lit. 280.

(1) But and the estate greater estate in reversion. Abr. Merg. one and the or is said to the reversion. rittance, and same right there is no ments, &c.

hold for his life; in both these cases, he hath an estate for his life only.

And if I lease land to a man for his own life, and after release to him, to have and to hold for his own life; hereby he hath but an estate for his own life.

But if I make a lease to him for another's life, and after release to him, *Habendum* for his own life; by this he hath an estate for his own life.

But if I be seized of land in fee-simple, and let it to another for life or years, and then release all my right to him, to have and to hold to him and his heirs, hereby he hath the fee-simple. And if I release all my right to him, to have and to hold, to him and the heirs of his body, hereby he hath an estate tail.

Lit. sect.  
549.

And if one be seized in fee of a rent service or rent-charge, and grant it first for life, and then release it to the grantee, to hold to him and his heirs, or to him and the heirs of his body; this shall enure as an enlargement according to the agreement.

\* P. 347

But if one grant a rent-charge for life out of his land *de novo*, and after release to the grantee all his right in the rent, to have and to hold to him in fee-simple, or fee-tail; this doth not enlarge the estate.

Lit. sect.  
606. 610.  
24 E. 3. 28.

And if tenant in tail, or for life, make a lease for years; and after by deed doth release all his right to the lessee for years in possession, to hold to him and his heirs for ever; this will not make the estate of the lessee good for longer time than the life of the releasor.

Co. super  
Lit. 273.

If one make a lease for ten years, the remainder for twenty years to another, and he in remainder release all his right to the lessee for ten years; in this case, the releasee hath an estate for thirty years and no less, for one lease for years cannot drown in another (1).

Lit. sect.  
426.  
Co. super  
Lit. 299.  
300.

If I let land to a woman sole for her life, or for years, and she take a husband, and after I release to them two to hold for their lives; this shall enure no further than the intent, and in the first case he shall hold jointly with his wife, but in her right, whilst she doth live, and after for his own life if he survive; and in the last case, they shall have the freehold jointly.

Co. super  
Lit. 280.

If there be Lord and tenant by fealty and rent, and the Lord granteth the seigniority for years, and the tenant attorneth, and the Lord releaseth his seigniority to the tenant for years and to the tenant of the land generally; by this, the seigniority is extinct for ever, and the estate of the lessee also. But if the release be to them and their heirs; then the lessee shall have the inheritance of the one moiety, and the other is extinct.

(1) But he that has an estate for ten years may surrender to him that has an estate for twelve years; and the estate is drowned and the other shall come into possession; and a surrender to him that has a greater estate for years is good as to him that has an estate for life, and where the surrender is to a termor in reversion, it is all one if the reversioner had a greater estate for years or not, *Cro. Eliz.* 302.—*Vin. Abr. Merger (G.)*—*Merger* is described to be whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate; whereby the less is immediately annihilated, or is said to be *merged*, that is sunk or drowned, in the greater.—Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger, *2 Bl. Com.* 177.—and see fully as to the doctrine of merger in the several abridgments, &c. under titles *Merger*, and *Extinguishment*.

10. Acquittance.  
*Quid.*

An acquittance is a discharge in writing of a sum of money, or other duty, which ought to be paid or done; as, if one be bound to pay money on an obligation, or rent reserved upon a lease, or the like; and the party to whom the money or duty should be paid or done, upon the receipt thereof, or upon some other agreement between them, maketh a writing under his hand, witnessing that he is paid or otherwise contented, and therefore doth acquit and discharge him of the same; the which is such a discharge and bar in the law, that he cannot demand and recover the same again contrary thereunto, if the acquittance be shewed.

\* P. 348 †  
11. Where  
a man is not  
bound to  
pay money  
without he  
hath an ac-  
quittance.

\* The obligor is not bound to pay money upon a single bond unless the obligee will make to him an acquittance or release. Nor is he bound to pay it before he hath the acquittance. And in this case the obligor may compel the obligee to make him an acquittance. And so it is in case of a statute merchant; one is not bound to pay the money thereupon, before he hath the acquittance or release of the plaintiff. But otherwise it is in case of an obligation with a condition, for there a man may aver payment (1).

And because statutes, recognizances, and obligations, are often used and tend to the strengthening of the common assurances of the kingdom, we may not in any wise pass them over, but must take some survey of them. And first of a statute.

(1) See fully in what cases payment may be refused without an acquittance given, *Vin. Abr. Acquittance (A.)*

† In the former edition of the *Touchstone* there is a mistake in numbering the pages; the numbers between p. 348. and p. 353 being omitted.

Terms of  
the law, ft  
de merca-  
toribus Ac  
ton Burne  
17 Ed. 1.

27 Ed. 3.  
Stat. 2. cap.  
1, 2, 3, &c.  
27 Ed. 3.  
Stat. cap. 9.  
22 H. 8.  
c. 6.  
Co. Super  
lit. 289.  
15 H. 7. 16.

(1) Statute  
be securities to  
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## C H A P. XX.

## Of a Statute.

Terms of  
the law, stat.  
de merca-  
toribus Ac-  
ton Burnel.  
11 Ed. 1.

\* A Statute is a bond or obligation of record: but this word is sometimes used in another sense, viz. for a decree made in parliament, called an Act of Parliament. \* P. 353.

And of these obligations there are three kinds: 1. A statute merchant: 2. A statute staple: 3. A recognizance. The statute merchant, is a bond acknowledged before one of the clerks of the statute merchant, and the mayor, or chief warden of the city of London, or two merchants of the said city for that purpose assigned, or before the mayor, chief warden, or master of other cities, as York, Bristol, or the like; or the bailiff of any borough or village, or other sufficient men for that purpose appointed and authorized, sealed with the seal of the debtor or recognisor, and of the King, which is of two pieces; the greater whereof is kept by the mayor or chief warden, and the lesser by the said clerk: and the form of it is thus: *Noveritis &c. me A. B. teneri C. D. in centum libris solvend. eidem ad festum S. Mich. proxim. Et nisi fecero, concedo quod currat super me & hæredes meos districtio & pæna in statuto domini regis edito apud Westm. Dat. &c.* And this, albeit at first it was ordained and used for merchants only, yet at this day it is and may be used and given by any others, and is become one of the common assurances of the kingdom (1).

27 Ed. 3.  
Stat. 2. cap.  
1. 2. 3. &c.  
27 Ed. 3.  
Stat. cap. 9.  
22 H. 8.  
c. 6.  
Co. super  
lit. 289.  
15 H. 7. 16.

The staple doth signify this or that town or city, whither the merchants by common order and commandment do carry their commodities, as wool, and the like, to utter by the great. And the statute staple is either properly or improperly so called: that which is properly so called, is defined to be a bond of record acknowledged before the mayor of the staple in the presence of one or two constables of the same staple, and is sealed with the seal of the staple, and sometimes also with the seal of the party, the which it seems is not necessary. And this is founded upon the statute of 27 Ed. 3. cap. 9. and was invented, and is used only for merchants and merchandizes of the same staple: this is of the same nature as the statute merchant is. That which is improperly so called, is also called a recognizance, which is also a bond of record, testifying that the recognisor doth owe to the recognisee a sum of money. And of these there are divers kinds; for there is one recognizance founded upon the statute of 23 H. 8. cap. 6. The form whereof is this: *Noveritis &c. me A. B. teneri C. D. in centum*

(1) Statute merchant and statute staple are described by Mr. Justice Blackstone (in 2 vol. Com. 160.) to be securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied; and during such time as the creditor so holdeth the lands, he is tenant by statute merchant, or statute staple.—Statute merchant is pursuant to the stat. 13 Edw. 1. de mercatoribus.—Statute staple is pursuant to the 27 Edw. 3. c. 9.—Though the statute merchant was first introduced and wholly calculated for the benefit of merchants, yet they were not long ingrossed by them; for other men finding from their own observation that they were much of the same nature with judgments given in Westminster Hall, but obtained with infinite less trouble and expence, out of regard to their own interest and quiet, easily fell into this way of contracting, and by degrees it came to be improved into a common assurance.—See Hickford's case, Winch. Rep. 83.

\* P. 354. *libris solvend. eidem ad festum S. Mich. \* proxim. Et si defecero in solutione debi. predict. volo & concedo quod tunc currat super me hæredes & executores meos pœna in statuto staple debet. pro marchandisiis in eadem emptis recuperand. ordinat. & provis. dat. &c.* And this is always to be acknowledged before the chief justice of the King's Bench, or of the Common Pleas in the term time, or in their absence out of term, before the mayor of the staple at *Westminster*, and the recorder of the city of *London* for the time being (1). And it is to be sealed with the seal of the consor, and with the seal of the King appointed for that purpose, and with the seal of the chief justice, mayor and recorder before whom it is acknowledged; and they, before whom it is taken, do subscribe their names to it: and this was ordained, and may be and is used by merchants, or any other whomsoever, for payment of debts, or assurance of other things: and this also is of the same nature as the statute merchant is: and both this and the two former, are much of the nature of judgements had upon suits in the courts of King's Bench and Common Pleas, and therefore they are called Co. 8. 153. pocket judgements.

Pocket  
judgments.

Bail.

Prerogative.

Conusor.  
Conusee.

\* P. 355. The debtor, or he that doth enter into the statute or recognizance, is called the recognisor, or conusor; and the debtee, or he to whom it is made, is called the recognisee or conusee.

\* To make a good statute or obligation of record, the form prescribed must be pursued. 1. In respect of the persons before whom: and therefore, the statute merchant, or staple, or the recognizance founded upon the statute of 23 H. 8. may not

There are also divers other kinds of recognizances that are taken by and acknowledged before the Lord Keeper, Master of the Wards, Master of the Rolls, Master of the Chancery, Justices of the one bench or of the other (some of which are called bails) Barons of the Exchequer, Judges in their circuits, Justices of the Peace, Sheriffs, and others; some whereof are by the common law, and some by certain statutes. And amongst these, some are without seal, and recorded only, and some are sealed and recorded also: and some of them are in a sum certain, as the recognizances taken in the Common Pleas for bail are, and some of them are incertain, as those recognizances that are taken for bail in the King's Bench, which are after this manner, *Si judicium redditum &c. tunc volo & concedo*, that the debt recovered against the defendant shall be levied of my goods and chattels, &c. And these also are much of the nature of the former kind of recognizances. And all obligations made to the King are of the nature, and have the force of a recognizance (2).

Statutes and recognizances are sometimes single, without any defeasance; and sometimes they are double, *i. e.* with a defeasance or condition, upon the performance whereof the same are to be avoided.

See Statutes  
33 H. 8.  
c. 22. 39.  
3 H. 7. c. 1.  
10 H. 6. c. 1.  
Dier 315.  
307.  
F. N. B.  
251. f. 137.  
c. 133. a. 68.  
a.

Dier 35.  
Lit. Bro.  
sect. 484.  
511.  
F. N. B.  
267. a.

(1) A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record. 2 Bl. Com. 341.

(2) See more amply as to the nature and description of statute merchant,—statute staple,—and recognizance, in *Vin. Abr. Statutes* (E. 11.)—*Com. Dig. Statute-staple* (A.)—*Ecc. Abr. Execution* (B.)

Holling-  
worth v.  
Aicugh.  
Palsch. 35.  
C. B. ad-  
judged.

Perk. the  
Justices  
Trin. 22]

Co. 8. 153

Stat. 27 E.  
cap. 4.

Fitz. Ac-  
compt. 97.  
Execution  
in toto.  
Bro. Statu-  
in toto.  
Stat. A.G.  
Burnel de  
Mercatori-  
bus.  
27 E. 3.  
c. 9. F.N.  
130. 131.  
132.  
Dier 180.  
15 H. 7.  
Co. 4. 67.  
7 H. 7. 12.  
Flow. 61.  
62. 82.

(1) See  
third of k  
mayor of t  
the princip  
(2) See  
Statutes (I

- be acknowledged before any others besides the persons appointed first, in respect of the persons before whom it is acknowledged.
- Dier 220. and therefore a recognizance taken by a constable is void. If a recognizance be made to the Lord Keeper and two others, and it be acknowledged before himself, this is void as to him. 2. In respect of the manner of making and acknowledging of it. And therefore Secondly, in respect of the manner of making it.
- Hollingworth verf. Aicugh. 35 El. C. B. adjudged. it will be void. If therefore a statute merchant be not sealed with the seal of the debtor, and there be not a seal of two pieces annexed to it, this is no good statute, neither can it take effect as a statute; howbeit in this case, if it be delivered by the party, it may take effect as an obligation: but if the variance from the statutes be only in some circumstance, this will not hurt a statute or a recognizance. And therefore it is held, that albeit there be no time set for the payment of the money in the statute, yet the statute is good, for then it is due presently. And albeit the statute be written with another's hand, and not with the hand of the clerk of the statutes or the like, yet is the statute good enough. And if a statute staple be not sealed with the seal of the party that doth acknowledge it; yet it seems it is good enough, for the statute doth not require it: but a recognizance within the statute of 23 H. 8. cannot be good, except the seal of the party be to it, for so are the words of the statute (1).
- Co. 8. 153. If a recognizance or a statute be to pay money at several days, it is good enough; and if the conusor fail one day, execution may be sued of the whole statute (2).
- Stat. 27 El. cap. 4. Every statute staple or merchant, not brought to the clerk of the recognizances within four months next after the acknowledging, to enter a true copy thereof, shall be void, against all persons, their heirs, successors, executors, administrators and assigns, except those only, which for good consideration shall, after the acknowledging of the same statute, purchase the land or any part liable thereunto, or any rent, lease or profit out of it.
- Fitz. Ac-compt. 97. Execution in toto. Bro. Statute in toto. Stat. Acton Burnel de Mercatoribus. 27 E. 3. c. 9. P. N. B. 130. 131. 132. Dier 180. 15 H. 7. 15. Co. 4. 67. 7 H. 7. 12. Plow. 61. 62. 82. \* The proceedings upon a statute or recognizance, to have the fruit and effect thereof, are not like to the proceedings in other cases of suits upon obligations and the like, to reduce them to judgment; but as they are in their own nature much like to the nature of a judgment, so is the proceeding and execution thereupon much like to the proceeding and execution upon a judgment: and therefore the conusor may if he please, bring an action of debt upon a statute, and waive all other proceeding: or otherwise, if he like not this course, he [or, if he be dead, his executor or administrator, and, if his executor be dead, the executor of his executor] may, as soon as the same is forfeit, have present execution of it after this manner: he must bring
- \* P. 356. 4. All the proceedings upon a statute or recognizance; and the manner and order of execution thereupon.

(1) See the statute 8 Geo. 1. c. 25. being an act for supplying some defects in the statute of the twenty-third of king Henry the eighth, intitled, an act for obligations to be taken by two chief justices, the mayor of the staple and the recorder of London, and for setting down the time of signing judgment in the principality of Wales, and counties palatine.

(2) See further what shall be deemed a good statute merchant, staple, or recognizance in *Vin. Abr. Statutes (F.)*



his statute to the Mayor and clerk and other officer, before whom it was acknowledged; and there if they find the record of it, and the day to be paid for the payment of the money, they are to apprehend and imprison the body of the conusor, if he be a lay-person, and can be found within their jurisdiction; and if he cannot be found there, they are to certify the record into the chancery, which also, if they refuse to do, they may be compelled thereunto by a *certiorari*; and if that certificate be faulty, or execution be not done upon it by reason of the death of the conusee or otherwise, the conusee or his executor, or administrator, may have another certificate; and thereupon, in case of the statute merchant, he shall have a writ of *capias* out of the chancery, directed to the sheriff of the county where the conusor lives, to apprehend and imprison him (if he be not a clergyman) and this is to be returned in the Common Pleas or King's Bench. And when the conusor is taken, he shall have time for a quarter of a year to make his agreement with the conusee, and to sell his lands or goods to satisfy the conusee: and for that purpose he may sell his lands or goods, albeit he be in prison, and his sale is good and lawful: and if in that time he do not satisfy the conusee, or if upon the *capias* the sheriff return a *non est inventus*, then by another writ [or by divers writs, if the lands or goods lie in divers counties] called an *extendi facias*. And in the case of a statute staple, presently after the certificate into the Chancery, the conusee shall have a writ to take his body, and extend his lands and goods returnable in Chancery: and this writ is a commission directed to the sheriff of the county where the lands and goods lie, for the valuing of the same; whereby all the lands, goods and chattels of the conusor shall be appraised and valued at a reasonable rate by a jury of sworn men, charged by the sheriff for that purpose; which inquisition so taken is to be returned by the sheriff, and thereupon the lands, goods and chattels are to be taken into the sheriff's hands, and by him to be delivered to the conusee (which the sheriff may do if he will without any writ) to hold unto the conusee until he be satisfied his debt and damages. And if the sheriff refuse so to do, the conusee shall have a writ out of the chancery called a *liberate*, to compel him to deliver to the conusee the lands, goods, and chattels, so found by inquisition, and taken into his hands upon the extent, which the sheriff need not to return; or the conusee may enter upon the land himself, and take the goods out of the sheriff's hand: and this act of the sheriff and jury upon this writ is called an extent: and if the jurors or appraisors upon the *extendi facias*, overvalue the lands or goods in favor to the debtor, the conusee hath no remedy but by motion in that court where the writ is returnable at the return day, or at least the same term wherein the writ is returnable, to desire that the appraisors may take the lands or goods at the rate they have valued them, in the same manner as the conusee is to have them. But if the conusee accept of the lands and goods from the sheriff, or suffer the term to pass wherein the writ is returnable, he is too late, and hath no remedy at all. And if the appraisors do undervalue the lands or goods in favour to the debtor, it seems the conusor hath no remedy at all, for he may at any time pay all or the residue of the debt and damages unlevied, and have his land again if he please.

Co. super  
Lit. 290.  
Stat. 23 H.  
8. c. 6.  
5 H. 4. c. 12.  
2 R. 3. 7.  
14 Ed. 3. 11.  
Lit. Bro.  
Sect. 294.  
123. 262.  
Dier 299.  
Co. 5. 87. 4.  
82. 57. 66.  
Stat. 11 H.  
6. c. 10.  
Kitch. 116.

Adjudged  
Butler v.  
Wallis, post.  
38 Eliz. B.  
R.

(1) And  
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44—Br.

please. And in case where the inquisition or extent taken and made, is insufficient, as if part of the land only be extended in the name of all the lands, or it is found the conusor died seised of land, and it is not said of what estate, or the like, the conusee shall have a new extent, and this is called a re-extent; and this Re-extent. he may have, albeit the lands or goods be delivered to the conusee by a *liberate*, if the conusee have not entred upon and accepted it, but if he once accept it, he can never after have a re-extent: and when the conusee is in possession of lands by such an extent as before, then is he tenant by statute; and after the conusee is once settled in peace in the lands extended, he shall hold it until he be satisfied his debt, and his reasonable costs and damages for travel, suit, delay, and expence. But it seems the time shall not run out nor be said to begin until the entry of the conusee into the land; for if the land be extended and remain seven years without a *liberate* made, yet he may have a *liberate* at the end of the seven years; and as soon as the conusee shall be satisfied his debt and damage by the goods and chattels of the conusor, and by the ordinary and certain, or extraordinary and casual profits of the land, the conusor shall have his land again: and for that purpose, if the conusee refuse to give him an account, and to yield up his land to him the conusor, howbeit he may not enter, yet he may compel the conusee thereunto by a writ called a *venire facias ad computandum*, *Venire facias ad computandum*, in the nature of a *scire facias*; by which the conusor shall call the conusee, his \* executors or administrators, to account; and if, upon the account, it shall appear he is satisfied, the conusor shall have his land again; and if it appear he is over-satisfied, he shall answer the overplus to the conusor. But the conusor may not enter upon the conusee until he hath brought this writ, and made it thereupon to appear that the conusee is satisfied (1). And in case the conusee be dead, his executor or administrator may have execution of the statute without any *Scire facias*, upon the shewing of the statute and the testament in Chancery. And if the sheriff return that the conusor is dead, the execution shall be made of his lands only in the hands of his heir or the purchaser; but if the heir be under age, the execution cannot be done until he be of full age: and if the conusor die in prison, the execution shall be of his lands, goods, and chattels: and if the gaoler that hath him in prison suffer him to escape, he must answer that debt: and if it fall out that the conusee, his executor or administrator, be ousted, or disturbed of his execution by the conusor himself, or any other during the time of the extent, he may relieve himself against the disturber by assise, or other action, as another in the like case may do: and if he be rightfully ousted or disturbed by one that hath better right, as by one that hath a former statute or the like, or by

Tenant by statute.

Quid. P. 358.

Executor.

Age.

Escape.

(1) And when the conusor brings a *Scire facias ad computandum*, at common law the conusee shall not account according to the true value, but according to the extended value; and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind with damages, he shall also recover. But if the conusor will sue the conusee in a court of equity, then he shall bring him to account for what he hath received of the profits above the extended value. *Marsb v. Lee*, 2 Vent. 338.—See further as to the conusor's remedy when the conusee is satisfied, in *Bac. Abr. Execution* (B 7).—*Com Dig. Statute-Staple* (G).—and *Vin. Abr. Statutes Merchant* (P. 2) where in *pl. 3*. it is said—*Scire facias ad computandum* does not lie against conusee upon a statute-merchant or staple; per *Bank J. quod nota bene*.—*Br. Abr. Scire facias*, *pl. 153*, cites 22 *Aff. 44*.—*Br. Abr. Statute-Merchant*, *pl. 24*, cites, S. C.

the act of God, as by fire, water, or the like; in these cases, the conusee shall hold the land over after the time of his extent, until he be satisfied. But when it is through his own neglect only that he is unsatisfied, as where the lands are delivered to him by the *liberate*, and he after his entry into them make a conditional surrender of them; as if lands of the value of 10*l.* by the year, be delivered to him in execution for 40*l.* and he within four years make a conditional surrender of them to the conusor, and after he enter for the condition broken, in this case he shall not hold the land over the four years, for he must take the profits upon his extent presently: the proceeding in execution of the statute staple, and the recognizance founded upon the statute of 23 H. 8. is after the same manner throughout as the proceeding in execution of the statute merchant is; with these differences only; that, upon the execution of the statute merchant, there doth issue forth a *capias* against the body before, any execution be to be made of the lands, or goods and chattels, and the lands and goods cannot be extended until a quarter of a year be past after the body is taken, or the sheriff have returned a *non est inventus*; but upon the execution of the statute staple and the recognizance, the body, goods, and lands may be taken together at the first; this therefore is a more speedy remedy than the former. Also upon a statute merchant, one may have an action of debt; but otherwise upon a statute staple; and the *capias* upon the statute merchant may be returnable in the King's-Bench, or Common-Pleas, but \* the writ of execution upon the other is to be returned in the Chancery.

\* P. 359.

The proceeding upon the other sort of recognizances is after another manner; for upon recognizances at the common law, if the money be not paid at the day, the conusee, his executor, or administrator, is to bring a *scire facias* against the conusor, or if he be dead against his heirs when they be full of age; or if the lands the conusor had at the time of entering into the recognizance, be sold, against the purchasers of these lands which the conusor had at any time after the recognizance entered into, to warn them to come into that court whence the *Scire facias* cometh, and to shew cause why execution should not be done upon the said recognizance; and if the party or parties cannot be found to be warned, or being warned do not appear at the time, or appearing shew no cause why the debt should not be levied, then the conusee shall have execution of a moiety of his lands by *elegit*, or, if the conusor be living, of all his goods by *levari* or *feri facias* at his election; but he cannot have execution of his body, unless he bring an action of debt upon the recognizance, or it be by course of the court, as it is in the King's-Bench upon a bail, in which case a *capias* doth lie.

*Elegit.*

*Levari facias.*

*Fieri facias.*

*Capias.*

*Sureties.*

The proceeding against the sureties in statutes shall be as the proceeding against the principal; but in case where there are moveables of the principal to satisfy the debt, the surety (as it seems) shall not be charged (1).

5. What things are subject and liable to execution upon

When a man doth enter into a statute or recognizance, the land of the conusor is not the debtor, but the body; and the land is liable only in respect that it was in the hands of the

(1) See more amply as to the manner of suing out execution on statutes and recognizances; and wherein the recognizance differs from the statutes, and they from each other, in *Bac. Abr.* Execution (B. 2.)—*Vin. Abr.* Statutes-merchant (K.)—*Com. Dig.* Statute-staple (D.)

conusor

Stat. de M.  
catoribus.  
Co. 3. 12.  
Plow. 72.  
Co. 2. 55.  
Lit. sect.  
358.  
Dier 205.  
Bro. Stat.  
Merchant.  
44.  
Dier 7.  
Co. super.  
Lit. 374.  
Dier 373.

Doct. &  
Stud. 53.  
Bro. St.  
Marcha.  
Dier 205.  
Harring-  
ton's case.  
Palch. 9.  
Jac. B. R.  
a Co. 7.

Dier 7.  
Co. super.  
Lit. 374.  
Doct. &  
Stud. 53.  
Co. 2. 59.  
62.

Stat de M.  
catoribus.  
Dier 299.  
Plow. 82.  
Co. 7. 39.  
3. 12.  
Bro. Reco-  
nizance 7.  
Co. 1. 62.  
13 H. 7. 2.  
Bro. Stat.  
Merchant.

15 H. 7. 16.  
P.N.B. 130.  
131.

Dier 360.  
315.  
Kelw. 100.  
Wells. 2.  
chap. 18.  
Bro. Exe-  
cution 129.  
Co. 3. 11.  
15 H. 7. 16.  
Kitch. 117.

Stat de M.  
catoribus.

Plow. 72.  
Co. 10. 50.  
51. Bro. St.  
Merchant.



conufor at the time of acknowledging of the ftatute, or after ; on a ftatute and the land is not charged with the debt, but chargeable only or recogni-  
at the election of the conufee ; but the perfon is charged ; and the zance : and  
land is chargeable in refpect of the perfon, and not the perfon in when, and  
refpect of the land. And therefore albeit the conufor alien his how ; and  
land to another, yet he remains debtor ftill, and his body and his what not.

Stat. de Mer-  
catoribus.

Co. 3. 12.

Plow. 72.

Co. 2. 59.

Lit. fect.

358.

Dier 205.

Bro. Stat.

Merchant

44.

Dier 7.

Co. fuper

Lit. 374.

Dier 373.

goods fhall be taken in execution : and yet, when execution is fu-  
ed upon the land, the land is charged and become debtor alfo.

The body of the conufor himfelf, but not the body of his heir, executor, or adminiftrator, is liable to execution and may be taken, albeit there be lands, goods and chattels to fatisfy the debt ; and all the demefne and copyhold lands, tenements, and hereditaments, corporeal and incorporeal of the conufor that are grantable over, as his manors, meffuages, lands, meadows, paftures, woods, rents, commons, tythes, advowfons and the like ; alfo all his goods and chattels, as leafes for years, wardfhips, emblements, cattle, houfhould-ftuff, and the like, are liable to execution upon \* a ftatute. And therefore if a man make a leafe \* P. 360.

for life, or years, and after enter into a ftatute, or recognizance ; this reverfion *cum acciderit* fhall be fubject to execution, and the conufor cannot (as it feems) by any fale thereof prevent it. And yet the contrary hath been held for law, *Lit. Bro. Sect. 227*. And if one make a feoffment in fee, or leafe for life, referving a rent, this rent is extendable and the conufee may diftrain for it. <sup>1</sup> So if the leffee for life make a leafe for years rendring a rent, and then the leffee for life enter into a ftatute ; this rent is fubject to execution, and it feems the conufee may bring an action of debt againft the leffee for years for it. <sup>2</sup> And albeit the rent be-  
come extinct by the purchafe of the conufor or otherwife, yet as to the conufee it fhall be faid to be in *effe* and fubject to execu-  
tion ftill. And therefore if a rent be granted unto me for my  
life after the death of my wife, and after I do acknowledge a ftatute, and then my wife die, and then I releafe the rent to the terre-tenant ; this rent fhall be liable to execution. But annuities, offices in truft, feignories in frankalmoign, homage, fealty, rights, things in action, and fuch like things, are not liable to execution upon ftatutes or recognizances. Alfo a remainder in tail, or in fee, after an eftate tail in poffeffion, is not liable to execution in thefe cafes, except it happen to come into the poffeffion of the conufor.

Doct. &  
Stud. 53.  
Bro. St.  
Maicha. 44.  
Dier 205.  
<sup>1</sup> Harrington's cafe.  
Palch. 9.  
Jac. B. R.  
<sup>2</sup> Co. 7. 38.

The lands, tenements and hereditaments that are copyhold, albeit the conufor have the fee-fimple of them, yet are fubject to execution, only for the life of the conufor ; but his demefne lands wherein he hath an eftate in fee-fimple, are liable to execution for ever if need require.

The lands the conufor hath in joint-tenancy with another, are fubject to execution during the life of the conufor and no longer ; for after his death the furviving joint-tenant fhall have all ; but if the conufor furvive his companion, then all the land fhall be fubject to execution : and the lands the conufor hath as tenant in tail, are liable to execution only during the life of him being the tenant in tail ; for afterwards they fhall go to his iffue in tail. And yet if the tenant in tail, after he hath entered into a ftatute, fuffer a recovery of the land intailed, in this cafe the land fhall be fubject to execution as if it were fee-fimple land.

And

First, in ref-  
pect of the  
nature and  
quality of  
the things  
themfelves.

Second, in  
refpect of  
the eftate,  
property,  
and poffeffion of the  
conufor in  
the things.

Dier 7.

Co. fuper

Lit. 374.

Doct. &

Stud. 53.

Co. 2. 59.

62.

Stat. de Mer-

catoribus.

Dier 299.

Plow. 82.

Co. 7. 39.

3. 12.

Bro. Recog-

nizance 7.

Co. 1. 62.

13 H. 7. 22.

Bro. Stat.

Merchant.

And the lands the conusor hath in the right of his wife, shall be charged and subject to execution only during the lives of the husband and wife together, and no longer.

If a feoffment be made in condition to make an estate to another by a day of the same land, and before the day the feoffee enter into a statute or a recognizance; this land shall be subject unto execution until the feoffor re-enter, for the breach of the condition.

- \* P. 361. \* If one be disseised of land, and then enter into a statute; this land shall not be subject to execution: and yet if the conusor do after recover the land by entry or action, it shall be liable to execution.

The goods and chattels whereof the conusor is solely possessed, and possessed in his own right; and the goods and chattels of which he is jointly possessed with another; and the goods and chattels he hath in the right of his wife, are liable to execution. But the goods or chattels that he or his wife hath as executor or executrix to another, or as pledged only, it seems are not subject to execution. And if the conusor deliver goods to another to deliver over to I. S. these goods before they be delivered over are liable to execution. And if he have leases for years in the right of his wife, and die before execution be done, it seems these leases are liable to execution. *Sed quære.* But if the conusor have goods in his custody of another's man's, or have goods he hath distrained in the nature of a distress, these are not liable to execution.

3. In respect of the time. All the lands, tenements and hereditaments which the conusor had at the time of the statute or recognizance entered into, or at any time after, into whose hands by what means soever the same are betide and come at the time of execution, are subject and liable to the execution. But the lands the conusor had and did put away before the time of the statute or recognizance entered into, are not liable to execution. And all the goods and chattels the conusor hath, and are found in his hands, at the time when the execution is to be made by the *extendi facias*, are liable to the execution. But the goods and chattels he had and did *bona fide* do away before the time of execution done, are not liable to the execution.

4. In respect of the quantity. And of all these things before subject to execution, the conusor may take all or part at his pleasure. And therefore if the conusor have sold his lands to divers persons; or have sold some of his lands to divers persons, or to one man, and keep the rest in his hands, or it descend to his heir; the conusor may sue execution upon the lands in either of their hands at his election; so that if the cognissee after the statute entered into, and before execution, purchase part of the land of the cognisor, he may notwithstanding have execution upon the residue in the hands of the conusor, or in the hands of his heir; and yet so that in some of these cases his execution may be afterwards avoided, and he compelled to sue execution again.

The conusor upon other recognizances shall have the same things in execution as a man shall have after a judgment in a suit in the King's-Bench or Common-Pleas by *Fieri facias*, or *Levari facias*, all his goods and chattels, and by *elegit* the moiety of his lands, and all his chattels, besides the cattle of his plow and implements of husbandry. But in these cases he cannot take

the

Stat. 32  
8. chap.

Co. 4. 6.  
82.  
Plow. 6.  
15 H. 7.  
Co. sup.  
Lit. 299.  
Kitch 1

Co. 3. 12.  
Stat. de Mer-  
catoribus.

Bro. Sta.  
10. 48. 25.  
Plow. 72.  
See infra.

Westm. 1.  
Chap. 18.  
Plow. 72.  
Co. 3. 11.  
Dier 306.

Kelw. 100.

the body of the conusor in execution, unless it be upon a new suit, or in case of bail in the King's-Bench.

Stat. 32 H.

8. chap. 5.

Howsoever by the common-law after a full and perfect execution had by extent returned and of record, there shall never be any re-extent, yet by a special Act of Parliament it is provided, that if after lands, &c. be had in execution upon a just or lawful title, wherewith all the said lands, &c. were liable, tied, or bound, at such time as they were delivered or taken in execution, they shall be taken or recovered away from him before he hath received his full debt and damages; in this case, after a *Scire facias* had against the conusor his heirs, executors, administrators or purchasers, he (or his executors or administrators if he be dead) shall have a new execution to levy the residue of the debt and damages then unsatisfied. Wherein these things are to be observed; 1. In case where the conusee is unlawfully and wrongfully disturbed either by the conusor or by a stranger, in the taking of the profits of the land delivered to him in execution; there he may and must bring his action and recover damages, and these damages shall go toward his satisfaction; for in this case, and for this disturbance, he shall not hold the land a day the longer. And where he is hindred by his own neglect or act in the taking of the profits of the land, as where his debt is 40*l.* and he hath 10*l.* a year delivered to him by which he may satisfy himself in four years, and within the time he make a conditional surrender to the conusor, and enter for the condition broken; in this case, he shall not hold the land over, neither shall he have any re-extent. And where the let or disturbance is such as wherein the conusee hath remedy given him by the common-law to hold the land over after the disturbance removed; in this case, he shall have no new execution nor re-extent within this statute; for where the conusee hath remedy in *presenti* for part, or in *futuro* for all or part, this statute extendeth not to it; and therefore where the conusee is hindred in the taking of the profits of land by the act of God, as by fire, overflowing of water, or the like; or the act of the party conusor, or any by or under him, as when one is bound to *A.* in a statute of 100*l.* and after to *B.* in a statute of 200*l.* and *B.* extendeth the land first, and then *A.* extendeth the land and taketh it away from *B.* or when the guardian in chivalry doth put out the conusee by reason of the wardship of the heir of the conusor, or the wife of the conusor doth claim her dower and put out the conusee, or one disfeise his lessee for life, or oust his lessee for years, and then acknowledge a statute, and after execution is sued against him, and then the land is delivered to the conusee, and \* after the lessee for life or years doth enter; in all these cases, because by the common law the conusee may hold over the land after the time given him by the extent, and after the impediments removed, until he be satisfied his debt and damages, therefore, he shall have no aid of this statute by re-extent; for he is then only to be relieved by this statute when he is evicted and disturbed, and is wholly and clearly without any remedy at the common-law. 2. Where the statute saith [until he &c. or his assigns shall fully and wholly have levied the whole debt and damages] if he hath assigned several parcels to several assigns, yet all they shall have the land but until the whole debt be paid. 3. Where the words be [for the which

6. Where a man shall have a re-extent or new execution; and where not.

\* P. 363.

the



the said lands, &c. were delivered in execution] if *A.* disseisor convey the lands to the King, who granteth the same over to *A.* and his heirs, to hold by fealty and 20*l.* rent, and after granteth the seignior to *B.* *B.* acknowledgeth a statute, and execution is sued of the seignior, *A.* dieth without heir, and the conusee entreth and is evicted by the disseisor; in this case, he shall have the aid of this statute; but the perquisite of a villain being evicted is out of the statute. 4. Where the words be [delivered and taken in execution] yet if after the *liberate* the conusee enter (as he may) so as the land is never delivered, yet it is within the remedy of this statute. 5. Albeit the statute speak only of the Recoverer, Obligee, &c. and not of their executors, administrators or assigns, yet the statute shall extend to them. 6. Where the statute speaks of a *Scire facias* out of the same court, &c. if the record be removed into another court and there affirmed, he may have a *Scire facias* out of that court. 7. Where the statute gives a *Scire facias* against such person or persons, &c. that were parties to the first execution, their heirs, executors, or assigns, &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing in his hands were liable but the land recovered, if this land be evicted from the tenant by execution, no *Scire facias* shall go against him, his executors &c. but if he hath other lands subject to execution, then a *Scire facias* lieth against him or his assigns, but not against his executor; neither in that case can he have a *Scire facias* upon this statute against the first debtor or recognisor, but if there be several assigns of several parcels of lands subject to the execution, one *Scire facias* will lie against all the assigns (1).

7. Where and by what means a statute or recognizance, and the execution thereof, shall be discharged, suspended, or avoided in all or in part, and where not. \* P. 364. By defeasance.

A statute of recognizance, and the execution thereupon, may Dyer 297. be discharged divers ways, as by defeasance, release, payment of the 315. Co. 6. money, debt, and damages, or the residue thereof unlevied, delivery 13. 20. Ail. up of the statute, purchase of part of the land by the cognisee, or pl. 7. See the like. And therefore if there be a defeasance to the statute or Defeasance. \* recognizance, and it be to pay money at a day, or to perform some other thing, and the money be paid, or the thing done accordingly, this is a discharge of the statute. And therefore if such a statute or recognizance be afterwards sued against the conusor, he may be relieved by an *audita querela*. And if *A.* bind himself to *B.* by a statute of 20*l.* and *B.* sue execution, and the lands of *A.* are delivered to him in execution until he levy the money, and after Co. Super. *B.* doth make a defeasance to *A.* by indenture, that if *A.* pay Lit. 76. 10. 10*l.* by a day certain, then the statute or recognizance shall be 47. 50. 51. void; if this be done accordingly, the statute and the execution super Lit. thereupon is defeated and discharged. And if the cognisee 265. Bro. before execution, or after, release to the cognisor the statute or St. Mer. recognizance, or the debt; this is a perpetual discharge of the chant 25. See Release.

(1) As to the operation of the Stat. 32 H. 8. c. 5.—See *Cowley* and *Legat's* case in *Godb.* 257. and *Cro. Jac.* 338.—but more fully reported in 2 *Bull.* 97.—and further in *Co. Lit.* 289. b.—*Clerk* and *Andrew's* case in *Cro. Jac.* 693.—*Vin. Abr.* Execution (U. a. 3.)—*Com. Dig.* Statute-Staple (D. 7.)—See also the following statutes, whereby further provisions are made respecting executions, 2 *Jac.* 1. c. 13.—3 *Jac.* 1. c. 8.—21 *Jac.* c. 24.—16 and 17 *Car.* 2. c. 5. (made perpetual by 22 and 23 *Car.* 2. c. 5.)—16 and 17 *Car.* 2. c. 8.—and 29 *Car.* 2. c. 3.—3 *W.* and *M.* c. 14. § 5. 6—5 and 6 *W.* and *M.* c. 20. § 32—8 *Ann.* c. 14. § 1. the compals of a note not permitting, with propriety, an enumeration of the several particular purposes for which these numerous acts were made.

statute and the execution thereupon. But if the conusee before execution release to the conusor all his right in or to the land, this will not discharge the whole execution; for if he may not sue execution of the land afterwards, (as it seems he may, this notwithstanding,) yet he may sue execution of his body and goods. But such a release, after execution made of the land, will no doubt discharge the land. And yet if a conusee release all his right in the land to the feoffee of the cognisor of a parcel of the land, it seems this will discharge the land of execution; albeit it be before the execution sued, that this release is made. And so it is said it was resolved *Mich. 26. 27. Eliz.* If the cognisee assign the statute or recognizance to the cognisor or to the terre-tenant, by way of discharge of the debt or land; it seems this is a good

Barrow &  
Graies case  
38 Eliz.

Plow. 72 F. release and discharge of it in law. And if the cognisee purchase any part of the land of the cognisor after the statute or recognizance entred into; this is no discharge of the statute or the recognizance, but the cognisee may have execution notwithstanding of the lands that are left in the hands of the cognisor, or of his body, or goods, or all. But if the cognisee purchase parcel of the lands, and a stranger another parcel; in this case, the lands that are purchased by the stranger shall be discharged of execution. And if the cognisee, after execution sued, purchase any part of the land, or the fee-simple of all or part of it doth descend to him; by this the whole execution is discharged. And if the cognisee purchase all the lands of the cognisor; by this, the execution, as to the land, is suspended; but this is no discharge as to the body and goods of the conusor, for they are subject to execution still. And if the conusee re-infeoff the conusor again, the execution may be revived again against the lands of the conusor; so that they will be subject to execution again, whether they do continue in his hands or be sold away to others. So also if the \* conusee infeoff a stranger after he doth purchase the land, and the \* P. 365. stranger doth infeoff the conusor; in this case also, the execution is revived, and the lands shall now be subject thereunto as they were before.

By purchase  
or surrender  
of the land.

Harrington's case. Pasche 19. Jac. B. R. If a lessee for life make a lease for years rendering a rent, and after enter into a statute to *I. S.* and then enter into another statute to *I. D.* and after he doth grant his estate to *I. S.*; by this the execution of the statute made to *I. S.* is suspended; and therefore, during the suspension, it seems *I. D.* albeit he be after in time, may sue and have the rent in execution (1).

Plow. 72. Co. 3. 12. 6. 13. If the conusor, after he hath entred into a statute, or recognizance, doth convey away his lands to divers persons, and then the conusee sue execution of the statute upon the lands of one or some of them, and not of all; in this case, he or they, whose lands are taken in execution, may, by an *Audita querela* or *Scire facias*, have contribution from the rest; wherein these differences must be observed, that one purchaser shall have contribution from another: and therefore if the conusor sell some lands to *I. S.* and other lands to *I. D.* and the conusee sue execution only of the lands of *I. S.*; *I. S.* shall have contribution against *I. D.* And the feoffee of the purchaser, the feoffee of the heir of the conusor, the feoffee

8. Where the  
conusor, or  
his heir, or  
an alienee,  
or purchaser,  
shall have contribution upon  
a statute, or  
recognizance; or  
not.

(1) See more amply as to the several methods of vacating or discharging statutes, either before or after execution, in *Bac. Abr. Execution (B. 7.) Vin. Abr. Statutes (L.)—Com. Dig. Statute-Staple (F.)*.

of the feoffee, and another feoffee, shall have contribution of the heir of the conusor: but the conusor himself shall not have contribution from a purchaser: and therefore if he sell part of his lands, and keep part in his hands, and the conusee sue execution only of the lands in the hands of the conusor or his heirs; in this case, neither he, nor his heirs, shall have any contribution from the purchasers; and one heir shall have contribution from another. And therefore if one be seised of two acres, the one in burrough English, the other of other land, and he enter into a statute and dye, and he hath but two daughters, and the execution be sued upon the land of one of them; she shall have contribution from the other. So where some land doth descend to the heir of the part of the father, and some to the heir of the part of the mother.

If one be seised of lands in fee in the county of *A.* and *B.* and enter into a statute or recognizance, and the conusor dye, and then the conusee dye also, and his executor doth sue execution of the lands in *B.* only, and hath execution; and after the heir doth sell these lands; in this case, the vendee shall have no contribution. So also it seems the law is, if the heir sell the land to divers, and one of the purchasers appear to the *Scire facias*, and the judgment is given against him, and he afterwards sell the land, his vendee shall have no contribution. And in all these cases, where it is said the one purchaser shall have contribution, \* it is not intended that the rest shall give or allow him any thing by way of contribution; but that the party whose lands are extended, may by *Audita querela* or *Scire facias*, as the case requireth, defeat the execution, and thereby shall be restored to all the mean profits, and force the conusee to sue his execution upon all the land, that the land of every one of the terre-tenants may be equally extended.

And so we fall from an obligation by matter of record, to an obligation by matter of *fait*, which is no record.

Finch  
49.Co. su  
Lit. 1.a Bro. 6  
Obligat.  
30.  
b Trin.  
Eliz. B.  
c Co. su  
Lit. 229  
Fitz. Ob  
gation 9.Dier 21.  
23.  
Co. 9. c  
37 H. 6.  
22 Ed. 4.  
Kelw. 3.  
21 Ed. 4.  
11 H. 7.(1) Se  
Cem. 340  
(2) Fo



## C H A P. XXI.

## Of an Obligation.

Finches ley  
49.Co. super  
Lit. 172.

\* **A**N obligation is a deed in writing, whereby one man doth bind himself to another to pay a sum of money or do some other thing. And he that makes this deed is called the obligor, and he to whom it is made is called the obligee.

And it is sometimes simple, or single; which is, when it is to pay a sum of money, or do some other thing, and when it is without any defeasance on a condition in or annexed to it, which also is sometimes with a penalty called a penal bill, and sometimes without a penalty. And this is that which is most properly called an obligation; and sometimes also it is called a single bill, or single bond. And sometimes it is double or conditional; which is, when it is attended upon and accompanied with a condition. And then it is said to be a bond containing a penalty with condition to pay money, or do or suffer some act or thing, &c. And this condition is sometimes called a defeasance, and then especially when it is (as sometimes it is) in another deed or instrument; for most commonly it is inserted into the same deed wherein the obligation, being the other part of it, is contained. And then also it is either subscribed under the obligation, or included within the body of it, or indorsed upon the back of it. And *quacunq; via* if the condition be performed, the penalty is saved; if not, the penalty is forfeit (1.)

<sup>a</sup> Bro. 6.  
Obligat. 67.  
<sup>30</sup>.  
<sup>b</sup> Trin. 49.  
Eliz. B. R.  
<sup>c</sup> Co. super  
Lit. 229.  
Fitz. Obligation 9.

<sup>a</sup> An obligation may be made upon parchment or paper, and in loose parchment or paper, <sup>b</sup> or in a piece of paper or parchment sowed in a book, and either way it is good. But if it be made on a tally, piece of wood, or any other thing but paper or parchment, albeit it be sealed and delivered, yet it is void. <sup>c</sup> And it may be made in the first, or in the third person; (notwithstanding the statute of 38 Ed. 3. c. 4. which doth intend only obligations made beyond the sea.) And therefore an obligation so made, as *Memorandum quod A. de B. debeat C. de D. 10l. in cuius* &c. is good.

Dier 21. 22.  
<sup>23</sup>.  
Co. 9. 53.  
57 H. 6. 9.  
21 Ed. 4. 22.  
Kelw. 34.  
21 Ed. 4. 39.  
11 H. 7. 6.

Albeit the best manner and form of an obligation, is that which is most usual, as, *Noveritis me A. de B. teneri & firmiter obligari C. de D. in 20l. legalis &c. solvend. eidem C. aut suo cert. Attornat. executoribus aut administratoribus suis. Ad quam quidem solutionem bene & fideliter faciendam obligo me hæredes executores & administratores meos firmiter per præsentis, &c.* yet any words in a writing sealed and delivered, whereby a man doth prove and declare himself to have another man's money, or to be indebted to him, will make a good obligation (2); \* and therefore if a man by deed say but this, *memorandum* that I. A. of B. do owe to C. of D. 20l. to be paid at Easter next: or *memorandum*, that I. A. of B. have had of C. of D. 20l. of which there is 10l. behind, [or of which I owe him 10l.]: or

\* P. 367.  
1. Obligati-  
on. *Quid.*  
Obligor,  
obligee.

2. *Quota-*  
*plex.*

3. What  
shall be said  
a good obli-  
gation in its  
original crea-  
tion; or  
not.  
First, for  
the manner  
and form of  
it; and what  
words are  
sufficient to  
make an  
obligation.

\* P. 368.

(1) See fully as to the nature of the security called an obligation, in *Bac. Abr. Obligation* (A). 2 Bl. Com. 340. *Com. Dig. Obligation* (A.) *Wood's Inst.* 283 *Vin Abr. Obligation* (L).

(2) For various precedents of obligations, see *Mad. Form. Angl.* p. 355. 1 *Horjman* 174. 2 *Wood* 701.

*memorandum*, that *I. A.* of *B.* have received of *C.* of *D.* 20*l.* to be repaid him again : or *memorandum*, that *I. A.* of *B.* do grant to owe [or to pay] *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* do promise to pay *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* will pay to *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* have had 20*l.* of the money of *C.* of *D.* or *memorandum*, that *I. A.* of *B.* have borrowed of *C.* of *D.* 20*l.* or *memorandum*, that *I. A.* of *B.* do bind myself to *C.* of *D.* that he shall receive of me 20*l.* all these, and such like, are good obligations. So if one say <sup>d</sup> *memorandum*, that *I. A.* of *B.* bind myself to *C.* of *D.* that he shall receive 20*l.* by the hands of *I. S.* when *K.* doth come to his house, and at Michaelmas then next following 5*l.* this is a good obligation, and the words [by the hands of *I. S.*] are void. <sup>e</sup> So if one bind himself thus, *Memorandum*, that *I. A.* of *B.* owe to *C.* of *D.* 20*l.* for payment of which I bind myself and my goods ; this is a good obligation, and will bind the person, but not his goods. <sup>f</sup> So if one, by deed, covenant or promise to do a thing, and then useth these words, *Ad quam quidem promissionem perimplendam obligo me in* 20*l.* this is a good obligation for 20*l.* <sup>g</sup> So if one bind himself thus ; <sup>h</sup> *memorandum*, that *I. A.* of *B.* am bound to *C.* of *D.* to deliver him twenty quarters of corn by a day, *Ad quod performandum obligo me*, without more words ; this is a good obligation. So if one bind himself thus ; *memorandum*, that *I. A.* of *B.* bind myself to pay *C.* of *D.* 10*l.* at Easter, and if I fail to pay it then, I do grant to pay him 20*l.* this is a good obligation for the 20*l.* if he fail to pay the 10*l.* <sup>i</sup> And some say he may recover both the 20*l.* and the 10*l.* So if one bind himself thus ; <sup>k</sup> *memorandum*, that in consideration of a bill of 50*l.* wherein *I. S.* is bound for me to *I. D.* for payment of 20*l.* I do bind myself in 20*l.* to the said *I. S.* to save him harmless from all actions of the same ; this is a good obligation ; and if *I. D.* sue *I. S.* the bill is forfeit. Or if one bind himself thus ; be it known, &c. that *I. A.* of *B.* do owe unto *C.* of *D.* the sum of 14*l.* to be paid at the feast of, &c. together with six pounds which I owe him upon bills and recognizances subscribed with my hand ; this is a good bill, but it is good for no more but the 14*l.* and not for the 6*l.* for the words do only import the time of payment of the 14*l.*

If one make a writing in the form of a statute, which the party doth seal and afterwards legally deliver, but it is not sealed by the King's and the Mayor's seal according to the statute ; albeit this be not a good statute, yet it may be a good obligation.

If one bind himself to pay money or do any other thing, and afterward doth add this clause in the deed, *Et ad maiorem hujus rei securitatem inveni A. de B. & C. de D. fide jussores, quorum unusquisque obligat se in toto & in solid.* and these two do also seal and deliver the deed ; it seems this is a good obligation to bind them, albeit there be no other words in the deed.

If an obligation be made to *I. D.* to the use of *I. S.* this is a good obligation for *I. S.* in equity ; and some have said he may release it ; but this is much to be doubted ; for it is certain *I. S.* cannot sue the obligor in his own name ; but when he hath cause of suit, he may compel *I. D.* in chancery to sue the obligor.

If

Bro. Obl.

47. 14. H. 8.  
29. 21. Ed. 3.  
40. 4. Ed. 4.  
29.

If *A.* of *B.* bind himself to *C.* of *D.* to pay 20*l.* and say not when; yet the obligation is good, and the money is due presently. So if the obligation be *Solvendum nunquam*, or *solvendum* at doomsday, the obligations are good, and the *solvendum* void, and the money is due presently. So if *A.* of *B.* bind himself to *C.* of *D.* in 20*l.* *Solvendum A. de B.* [where it should be *solvendum C. de D.*] the obligation is good, and the *solvendum* void.

Dier 13.

Bro. Obl.

15. 68.

If the obligation be made thus, [*obligo me. &c.*] leaving out these words following [*haeredes executores & administratores*]; this is a good obligation, and the executors and administrators, but not the heir, are bound by it. And if it be made thus, [*solvendum* to the obligee & *successoribus suis*] and not [*executoribus &c.*] this is a good obligation; and the executors, and administrators, and not the successors, except it be in case of a corporation, shall take advantage of it.

Co. 10. 133.

Fitz. Obl.

12.

2 H. 4. 14.

An obligation may be good, albeir it contain false or incongruous Latin or English, or Latin be put for English, or *à contra*, if the intent of the parties may sufficiently appear (1): and therefore if one be bound by the name of *Johannes* for *Johannem*; or one bind himself in *octogenta*, for *octoginta libris*; or in *septingentis* for *septingentis libris*; in *viginti* for *viginti libris*; in *sewteen* for *sewteen pounds*; in *quingentis* for *quingentis libris*; <sup>1</sup> in *septaageffimo* for *septuaginta libris*; <sup>m</sup> in *sexingentis* for *sexcentis libris*; in *quingageffimis*, or *quinque decies*, for *quingaginta libris*; in *octogenta* for *octoginta libris*; or in *viginti liwers*, for *viginti libris*; in *viginti nobilibus* for *twenty nobles*; <sup>n</sup> or in *octigenta libris*, for *octoginta libris*; or *quinginta libris* for *quingaginta libris*, or the like; these misprisions will not hurt the obligations, for they are good notwithstanding. But if one by the obligation bind himself in <sup>o</sup> *quingagegentis libris*, or in *quingagegentis libris*, or in *quinagegentis libris*, or in *segintis libris*; these obligations are void; for, in these cases, the meaning is so uncertain, that it cannot be discerned, and no averment will serve to supply it in this case. <sup>p</sup> So if an obligation be dated 23 *die Aprilie*, in stead of *Aprilis*; this is a good obligation; and this mistake will not hurt.

And if an obligation have no date, or a false and impossible \* \* P. 370. date, or have but half the date, as the year of our Lord only; or if it want these words *In cujus rei &c.* or the like, if it be sealed and delivered, it is a good obligation (2).

Co. 10. 110.  
See Fait or  
Deed, Num.  
51.

A single obligation may be to pay money, or to do any other thing that is lawful and possible, and such obligations are good Secondly, for the matter and substance of it. But if the obligation be to bind a man to do a thing unlawful or impossible, it is void; and therefore if one bind himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void. So if the obligation be made for maintenance, or to that end, or if it be made pursuant to and in execution of an usurious contract, or the like, it is void. So if an obligation be made against the statute of 23 H. 6. it is void. So if one bind himself in an obligation, and the matter thereof is altogether uncertain, or insensible, it is void; but if there

See more  
infra.

(1) By stat. 4 Geo. 2. c. 26.—Bonds must be in the *English* language only, and not in *Latin* or *French* or any other language whatsoever.

(2) See accordingly *Wood's Inst.* 290.—1 *Wood* 767.—and more amply by what words an obligation may be made, in *Com. Dig.* Obligation (B.)—*Vin. Abr.* Obligation (D.)—*Bac. Abr.* Obligation (B).



be any reasonable certainty in it, it is good enough. So if one bind himself to go to *Rome* in three days under pain of 20*l.* this is void.

2. What shall be said a good condition of an obligation; or not. First, for the manner and frame of it.

The condition of an obligation may be either in the same, or in another deed, and it may be indorsed on the back of the obligation, subscribed under it, or contained within it; but the best way to make it, is the usual way, *viz.* The condition of this obligation is such, &c. And yet, if it be otherwise, it may be good; for if an obligation be made from *A.* to *B.* and on the back of the same these words are indorsed [that whereas the within bounden *A.* is bound to *B.* in 20*l.* yet *B.* willeth and granteth that if *A.* pay to *B.* 10*l.* at Easter, that then the obligation shall be void]; it seems this is a good condition. So if in the close of an obligation of 20*l.* these words be added [that if *A.* (the obligor) pay 10*l.* to *B.* (the obligee) at Easter, that the obligation shall be void]; this is a good condition. So if an obligation be made from *A.* to *B.* of 20*l.* and these words are subscribed [now therefore if the obligor pay 5*l.* quarterly for four years, then it is agreed that the obligation shall be void]; this is a good condition. So if a single obligation be made from *A.* to *B.* of 20*l.* and after the obligation is made, *B.* doth by another deed grant, that if *A.* pay him 10*l.* at Easter, the obligation shall be void; this is a good condition or defeasance. But if *A.* do bind himself in an obligation to *B.* of 20*l.* and after *B.* doth bind himself in another obligation to *A.* to perform the covenants of an indenture, and in this second obligation there is a proviso that *B.* shall not sue upon the first obligation till such a time; this is not a good condition.

If *A.* be bound to *B.* in 20*l.* with condition that if *B.* do not bring *A.* a horse before Easter, that the obligation shall be void; this is a good condition; and if the obligee will have advantage of it, he must perform the thing; *Et sic de similibus.* So if *A.* be bound in an obligation to *B.* in 20*l.* with condition that if *B.* shall bring twenty load \* of wood to the house of *A.* that *A.* shall pay him the 20*l.* or that *A.* shall pay him 20*l.* when *B.* shall bring him twenty load of wood to his house; these are good conditions; and the thing must be done before the money is to be paid.

If the condition of an obligation be, that if *A.* (the obligor, do not pay to *B.* (the obligee) 10*l.* that the obligation shall be void; 42. this is a good condition; but it shall be taken according to the words, and therefore the obligor is not to pay it; and if he be sued, he may plead performance of the condition in the not paying of it.

If these words be omitted in the close of the condition [that then the obligation to be void,] the condition is void; but it doth not hurt the obligation, for that remains single: but if the next words, *viz.* [Or else shall stand in force] be omitted, the condition is never the worse: for as the addition of them doth nothing add to, so the omission of them doth nothing detract from, the strength of the obligation.

Secondly for matter and substance of it.

The condition of an obligation may be to do any lawful or possible thing, as to pay money, deliver goods, or cattle, acknowledge a statute, enter into an obligation, make a release, make an estate, surrender an estate, make reparations, for quiet enjoying, to save harmless, to defend a title, to perform covenants, to abide an award, to perform a will, to give so much land or

Plow. 141.  
21 H. 6. 51.  
Fitz. Barre  
157.

Bro. Obli.  
89. Fitz.  
Barre 265.

Pasche 8.  
Jac. B. Simp  
son's case 21  
H. 6. 51.  
26 H. 8. 9.

26 H. 8. 8.

Bro. Count.  
69.

Bro. Obli.  
42.

Curia B. R.  
Pasche 90.  
Ja. True  
man & Pa  
ram's case.

See in Well  
Symb.

Pasche 8.  
Ja. Co. B.

or money in legacy, to purchase lands, to appear in a court, to marry another, not to sue, not to meddle with an executorship, not to revoke a letter of attorney, not to be surety, not to play at cards or dice, or any such like thing; and such conditions are good. So also it seems a condition, that a man shall not sell his goods, is good: but when the matter or thing to be done by the condition is unlawful or impossible, or the condition itself is repugnant, insensible, or incertain, the condition is void, and in some cases the obligation also. And herein these differences are to be observed.

Co. 10. 101.  
11. 53. Super  
Lit. 206.  
Dier 304.  
Plow. 64.  
Fitz. Obliga-  
tion, 13.  
See before  
in condition  
and in co-  
venant.

1. When the thing enjoined, or restrained, to be or not to be Against law,  
done by the condition, is such a thing in its own nature, as that the commission or omission thereof, is *malum in se*, there not only the condition, but the whole obligation also, is void *ab initio*: and therefore if one be bound in an obligation with condition, that he shall kill a man, burn a house, do any other felony, commit any trespass, maintain any suit unlawfully; or (being an officer) that he shall take fees by extortion, or that he (being a Sheriff, &c.) shall let a prisoner escape, or that he shall save the obligee harmless against an unlawful deed, or that he shall not save his land, or that he (being a tradesman) shall not use his trade, (and yet it seems, a condition, that a man shall not use his trade in one place, or at one time, or if he do that he shall pay so much by the year unto another, is not \* a condition against \* P. 372.  
law,) or that a man (being an officer and an officer *pro bono publico*) shall not exercise his office, or the like; this condition is void, and makes the obligation and so the whole deed void. But when the thing, to be or not to be done by the condition, is such a thing, as the omission or commission thereof in its nature is not *malum in se*, but only against some maxim of law; as that a man shall make a feoffment to his own wife; or is but *malum prohibitum* only; as that a man shall erect a cottage contrary to the statute of 31 *Eliz.*; or is repugnant to the estate; as that a feoffee of land shall not alien it, or take the profits of it; or that a tenant in tail shall not suffer a recovery of his land, or the like; in these cases, the conditions only are void, and the obligations remain single and without a condition (1). And yet perhaps, Equity.  
if the obligors be sued upon these obligations, they may have relief in equity (2).

Perk. sec.  
134. Co.  
Super Lit.  
207. Fitz.  
Oblig. 17. 27.

2. When the matter or thing to be done by the condition is Impossible.  
such a thing, as in its nature is impossible to be done at the time of the making of the obligation, there the obligation is

(1) In *Mitchell v. Reynolds* 1 Pr. Wms. 181. *Parker Ch. J.* in delivering the resolution of the court says,—All the instances of conditions against law in a proper sense, are reducible under one of these three heads: 1st. Either to do something that is *malum in se*, or *malum prohibitum*. *Co. Lit.* 206.—2dly. To omit the doing of something that is a duty. *Palm.* 172. *Hob.* 12.—3dly. To encourage such crimes and omissions. *Fitz. Obligation* 13. *Bro. Obligation* 34. *Dier* 118. Such conditions as these, the law will allow, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in *Co. Lit.* 206. a feoffment shall be absolute for an unlawful condition, but a bond void. See more amply as to the operation of obligation: where the conditions are against law, in *Bac. Abr. Obligation* (E. 3.)—*ante* in page 129. and the notes and references thereto.

(2) A Court of Equity will in such case decree the bond to be delivered up to be cancelled, according to the cases of *Tatten v. Mullineux*, *Mo.* 109. and *Jervis v. Bruton* in 2 *Vern.* 251.—Equity affords extensive relief in obligations; as, if they are obtained by fraud; if the consideration is not performed; or if it be illegal; or if there was no consideration at all; if the condition by accident becomes unreasonable; if the obligation was obtained by duress, force, or terror; and in various other cases, explained and well supported by authorities, in *Com. Dig. Chancery* (4 D.)—and *Eq. Ca. Abr. Tit. Bonds and Obligations*.  
good,

good, and the condition only is void. And therefore if I be bound in an obligation with condition, that I shall stand to the award of certain persons, &c. provided that the award be made before the tenth day of May next, and provided that I have warning fifteen days before the tenth of May, and this obligation is made the 9th day of May; this is a void condition: and so if I be bound in an obligation with condition, that I will go to Rome within three days; or that I will make an estate of white acre in Dale worth 10*l.* per annum, when *re verâ* it is worth but 5*l.* per annum; or that I will be nonsuit in such an action; or assure such a piece of ground, when in truth there is no such action, or piece of ground; this condition is void, and the obligation remains single and good. So if the condition be, that whereas *A.* had a judgment against *B.* the obligor for 20*l.* and the obligee hath acknowledged satisfaction, if therefore the obligor shall before such a day get a warrant from *A.* whereby the obligee may be saved harmless for the same acknowledgment, that then, &c. this condition is void, and, as it seems, the obligation also, for that it is not only impossible, but against law also. But when the thing to be done by the condition, is a thing possible at the time of the making of the obligation, and after by matter *ex post facto*, by the act of God, the act of the law, or the act of the obligee, it is become impossible; in this case the obligation, and the condition both, are become void: and therefore if a man be bound with a condition, that he shall appear the next term in such a court, and before the day the obligor dieth; hereby the obligation is saved. So if *A.* be bound to *B.* that *I. S.* shall marry *Jane G.* by such a day, and before the day, *B.* himself marry with *Jane G.* hereby the obligation is discharged, and *B.* shall never take advantage of it (1).

\* P. 373.  
Insenfible  
Incertain.

\* 3. When the condition of an obligation is so insensible and incertain, that the meaning cannot be known, there the condition only is void, and the obligation good: as if an obligation be made by *A.* to *B.* with condition, that *A.* shall keep *B.* without damage against *I. S.* for 10*l.* in which the obligee is bound to the obligor; this condition is void, and the obligation single. So if the condition be, that *A.* shall pay his part of the sums of money, that shall be levied for the trying of the customs of *M.* unless the word [levied] be used for taxed in that country, the condition is insensible and void. So if *A.* be bound to *B.* with condition to save him harmless, and say not for what, or against whom; this condition is void, and the obligation single: but if any sense or certainty may be made of it, the obligation and condition shall be both good (2).

Repugnant.

4. When the condition of an obligation in the matter of it is repugnant to the obligation itself, there the condition is void, and the obligation good: and therefore if the condition of an obligation be, that the obligee shall not have benefit by the obligation, or that he shall not sue for the money in the obligation, or the like; this condition is void, and the obligation

(1) See accordingly *verbatim* in 1 Wood 769.—and further as to the doctrine of impossible conditions in obligations—*Bac. Abr.* Obligations (E. 1.) *Vin. Abr.* Condition (C. a.) to (E. a.)

(2) For the doctrine of conditions in obligations where the words are insensible, see 1 Vent. 238. 2 Med. 285. 3 Lev. 21. 2 Saik. 462.



See Defea- single: and yet this by a defeasance made after the obligation  
fance. may be done (1).

10 H. 6. 14. 5. When the thing to be done by the condition, is to be done beyond the sea, it hath been held that the condition is void, and the obligation single, because the thing was not triable here. But it seems the law is otherwise now, and that the matter is triable here, and the condition good. And in all other cases where a deed in general is void for misnomer, disability, or otherwise, there an obligation is void. Not triable.

All bonds with conditions, for the enjoying of spiritual livings, contrary to the statute of 13 Eliz. chap. 20. are void by the statute of 14 Eliz. chap. 11 (2).

If any ladies or gentlewomen be drawn by flattery, or threatening, to enter into any obligation simple or conditional, to pay any money not truly due, they may be relieved by a course in the Chancery, for which see the statute of 31 H. 6. chap. 39.

Stat. 23. H. 6. chap. 10. No sheriff or his officers shall take any obligation, by colour of their offices, of any person in their ward, but only to themselves, and in the name of their office, with condition with sureties sufficient, that the prisoner shall appear at the day in the writ. And all others, taken in any other forms, shall be void. And persons that are in his ward, by execution, condemnation, *capias utlagatum*, excommunication, surety of the peace, or some other special case, being sent for by a justice for felony or the like, may not be bailed: and others that are arrested on a *capias* for debt, or an \* indictment, or otherwise by writ, bill, or warrant, that are main-pernable, must be bailed. For the better understanding of which statute, these things must be observed; that such obligations as differ and vary from the form of this statute in words and circumstances

5. When an obligation shall be void, for that it is made to another, and not to the sheriff, or to the sheriff in another manner than is appointed by the stat. of 23 H. 6. ch. 10.

\* P. 374.

only, are good notwithstanding this statute. \* And therefore if a prisoner make an obligation with a condition to appear and answer in a plea of debt, and say no more, nor do set down the cause of the debt; this is a good obligation. And if the sheriff take an obligation with one surety only, or with two sureties that are insufficient, or with two sureties of another county; this is a good obligation. So if the debt for which the party is arrested by three hundred pounds, and the sheriff take an obligation of one hundred pounds for his appearance, this is a good obligation; for in these cases it is left to his discretion, and it doth concern him only. So if the condition of the obligation be for appearance *mensse Pasche*, omitting *proximè futuræ*, yet it is a good obligation. So if the party be arrested by an attachment out of the Star-chamber upon a contempt, and the condition of the obligation is, that if the obligee shall appear, and then and there shall answer a contempt

(1) See accordingly *Mo. 811. Trot v. Spurling*.—and further as to repugnant conditions in *Vin. Abr. Conditions (B. a)*—*Bac. Abr. Obligations (E. 2)*.

(2) Bonds, entered into for some other particular purposes, are by several subsequent statutes declared to be void.—By stat. 5 & 6 Ed. 6. c. 16. Bonds which concern the buying and selling of offices which relate to the administration of justice, the King's revenue, &c. are made void, and see the cases of *Lee v. Cull*, *Cro. Eux. 529*.—and *Hill and Farmer, Style 29*. determined under that statute.—By the stat. 13 Eliz. c. 5. Bonds made to avoid the debt or duty of others are void.—Bonds given for money lent by a king are declared void by statute 16 Car. 2. c. 7—9 Ann. c. 14.—By statute 7 & 8 Wm. 3. c. 4.—Bonds given to procure any return of any member of Parliament or any thing relating thereto are declared void.—By stat. 12 Ann. sess. 2. c. 15. Bonds upon usurious contracts are made void.

by him committed against the King and his council, this is a good obligation. And if the party that doth make the obligation be not in the sheriff's custody, albeit the obligation be made in any other manner essentially differing from the form prescribed in the statute, if it be not against the common law, it is a good obligation. And therefore if when a *capias utlagatum* be delivered to the Sheriff against a man, the sheriff take bond of him for his fees, and his travel; this bond if it be not within this statute, yet it is against the common law, and therefore void, because it is by colour of the statute an extortion. But where the obligation, whether it be single, or double, made by a prisoner, doth essentially differ by addition, alteration, or diminution, from the form prescribed in the statute, there the condition and obligation both are void. And therefore if such a prisoner make an obligation to any other besides the Sheriff, albeit he to whom it be made be called Sheriff; or if he make an obligation to the Sheriff himself, and not by the name of his office; or if he make an obligation to him by the name of his office, and doth not rightly name him; as if he make it to *I. S. vicecomiti in comitatu prædicto*, whereas it should be *de comitatu prædicto*; all these obligations are void by this statute. And if the Sheriff take an obligation of a prisoner for his appearance, in case where he is not bailable by the statute, and so let him go free; or if he take an obligation of a prisoner that is bailable for his appearance, and doth insert other things into the condition, as to pay money for meat, drink, or fees, or the like; or if he deliver a man in execution, and take bond of him to save him harmless, or to \* be a true prisoner; all these, and such like obligations as these, are void by this statute. If a man be a prisoner in Ludgate upon a *Capias utlagatum*, and the gaoler take an obligation of him with two sureties, with condition to save him harmless, and to discharge his fees, and to yield his body at all times upon summons, &c. this is a void obligation, as well against the sureties, as against the principal. If the under Marshall of the King's Bench take an obligation of one in execution and a stranger, with condition to save him harmless of all escapes, and so suffer the prisoner to go at large, this is a void obligation. If the Sheriff of Bedford, having a prisoner by force of an execution, let him go at large, and take an obligation of him, with condition that he shall keep the Sheriff without damage against the King and the plaintiff, and be at all times at the commandment of the Sheriff as a true prisoner, and appear before the justices of the King at *Westminster*, &c. this is a void obligation.

If a man be a prisoner to the Sheriff for suspicion of felony, and after a writ comes to him to have all his prisoners at a certain day before the justices of goal delivery of the same county; and thereupon the prisoner doth make a single obligation to the Sheriff to appear before the Justices the day of the writ; this is a void obligation, because it is single and not with condition. And if the Sheriff bail one not bailable by a single obligation, it seems this is a void obligation.

A single obligation is always taken most in advantage of the obligee and against the obligor: but it is otherwise of the condition of an obligation; for this is always taken most in advantage of the obligor, and against the obligee.

If

6. How a single obligation shall be taken.

Antley's case  
Hill. 7. Jac.  
Co. B.

Co. 10. 101.

Nowell's case  
Trin. 21.  
Jac. Curia.

Dier 118.  
119.

Dier 324

Plow. 61.  
62.

Fitz. Obl. 1.

Dier 19. 3.  
Co. 5. 11  
9. 53. ob.  
B. 62. B.  
Joint-ten-  
cy 4. 16.  
Dec. 69.

Hill. 39.  
Elix. B. F.  
Adjudged

Dier 14. 27

See before

Dier 357.

Bro. Obliga-  
tion 59.

(1) See  
Vin. Abr.  
(2) See  
ibid. and

Dier 19. 310. If two, three, or more, bind themselves in an obligation thus, Joint and several.

Co. 5. 119. *Obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several; but if it be thus, *Obligamus nos & utrumque nostrum*; or *obligamus nos & unumquemque nostrum*; or *obligamus nos & quemlibet nostrum*; or *obligamus nos & alterum nostrum*; in all these cases, the obligation is both joint, and several; so as in these cases the obligee may sue all the obligors together, or all of them apart at his pleasure; but it seems he may not sue some of them and spare the rest, but he must sue them altogether, or all apart by several *precipes*; and in this case, he may have several judgments and several executions against the obligors, and take all their bodies in execution; but he shall have satisfaction but once, or from one of them only; for after he hath been satisfied by one, the rest shall be discharged. But in the first case, where the obligation is joint and not several, the obligee must sue all the obligors together, for he cannot sue one alone with effect without the rest, unless it be in some special cases, as where one of the obligors alone doth seal the deed, or where all of them do seal, but one of them is an infant, a woman covert, a monk, or the like; \* or where one of them is dead; for in these cases, \* P. 376. one, or some of them, may be charged without the rest. But otherwise the plaintiff cannot proceed in his suit against one, or some of them, without the rest, except the defendant give him advantage: for howsoever the suit be well begun, when one or some of them alone is or are sued, (for it shall not be intended that the rest are living, until it be shewed by the other party,) yet the defendant is not bound to answer, unless the rest be sued also; and therefore in this case, he or they that is or are sued alone, are thus to take advantage of it, *viz.* to shew the matter to the court, and to plead in abatement of the writ: for if he appear and shew it not, but plead *non est factum*, or the like, to the obligation, the jury must find against him, and he will be charged with the whole debt. And so also if one appear, and the other make default and is outlawed, it seems he that doth appear must answer all (1).

Dier 14. 271. Executors and administrators shall be bound by the obligation of Executors, the obligor, albeit they be not named (2): but the heir of the Heir. obligor shall not be bound by the obligation, unless he be named in the obligation, *viz. oblige me, hæredes, &c.*

See before If an obligation be made to one and his heirs, or to one and his successors; the executors and administrators, not the heir or successor, shall take advantage of it.

Dier 357. If one bind himself in an obligation of 200*l.* to *A.* and *B.* *solvend. 100l. to A. and 100l. to B.* and *A.* die, it seems the executors of *A.* shall not have 100*l.* but that *B.* shall have the whole 200*l. sed quære.*

Bro. Obligation 59. If one bind himself by obligation to *I. S.* to pay him an For the time 100*l.* when *K.* doth come to his house, and at Michaelmas of payment. then next following 100*l.* more; Michaelmas then next following shall be taken for next following the making of the

(1) See more amply as to joint and several obligations, in *Com. Dig.* Obligations (F. and G.)—*Vin. Abr.* Obligations (G.) & (P.)—*Bac. Abr.* Obligations (D. 4.)

(2) See accordingly *Br. Abr.* Obligation pl. 15.—Also the ordinary shall be bound if he administers, *ibid.* and *Vin. Abr.* Obligation (K.)



obligation, and not next following the coming of K. to his house.

If one bind himself to pay money upon a single obligation, and doth not say when; in this case, it must be paid presently (1).

If one bind himself by obligation to pay money at Michaelmas, and doth not say which Michaelmas; this shall be taken for Michaelmas next after the date of the obligation; and so also it shall be taken in the condition of an obligation.

7. How an obligation with a condition, or the condition of an obligation shall be taken. And how it must and ought to be performed.

\* P. 377. First in respect of the persons that are to do the thing.

Secondly in respect of the time when the thing is to be done.

If one bind himself to pay 20*l.* in the year of our Lord which shall be 1599. in and upon the thirteenth of October next ensuing the date of the obligation; this shall be taken to be due the 13th of October 1599. and not next after the obligation. See more *infra*.

The condition of an obligation when it is doubtful, is always taken most favourably for the obligor, in whose advantage it is made, and most against the obligee; yet so as an equal and reasonable construction be made according to the minds of the parties, albeit the words sound to a contrary understanding.

\* If something be by a condition to be done, and it is set down indefinitely, and not set down who shall do it, if the obligee hath more skill to do the thing than the obligor, it shall be done by him; otherwise it shall be done by the obligor: as if a taylor be bound to me in an obligation with condition, that if I bring him three yards of cloth which shall be measured and shaped, and if he make me a cloak of it, &c. and it is not said by whom it shall be shaped, this must be done by the taylor (2).

If the condition of an obligation be to pay money, or do any other transitory act to the obligee himself, and no time is set for the doing thereof, but a place only; this regularly must be done in convenient time, and that without request. So also in case where the thing to be done is in its nature local, but yet such a thing as may be done in the absence of the obligee, and without his concurrence, as to acknowledge satisfaction on a judgment, make a lease for years, or the like, it must be done in convenient time, and that without request. So also in case where the thing to be done is local, and the concurrence of both parties necessary thereunto, yet when it is to be done to a stranger and not to the obligee, as if the condition be that the obligor shall make a feoffment to I. S. it must be done in convenient time without request. But where the thing to be done is local, and the concurrence of both parties necessary thereunto, and the act is to be done by the obligor himself, or by a stranger to the obligee himself, as where the condition is that the obligor, or a stranger, shall infeoff the obligee; in this case, the obligor, or the stranger, shall have time to do it during his life, unless the obligee do hasten

(1) That is, in convenient time, if the act is of a transitory and not of a local nature, as in the instance in the text of payment of money; or the delivery of charters or the like.—6 Co. 30. b.—and *infra*.

(2) The contracts of parties are to be interpreted according to their intent and the subject matter; as if a taylor be obliged or promise to make a suit of cloaths for me, I ought to deliver him the cloth, for that is usual, and not for him to provide it: but if a shoe-maker be obliged to make a pair of shoes for me, he is also to find the leather, because it is usual, *per cur* in *Oats v. Thornhill*, 1 Lev. 93.—(See further by whom and to whom the condition of an obligation is to be performed, in *Bac. Abr. Obligations* (F. 3.)

Dier 128.  
per. 3. Jus-  
tices Trin.  
22. Jac. Co.  
B.

Curia in the  
Marches of  
Wales Trin.  
8 Car.

Agreed M. 9.  
Jac. B. R.  
Hil. 37 Eliz.  
B. R. Shar-  
plus versus  
Hauking-  
ton.

Dier 14. 51.

Perk. f. 8.  
785.

Co. super  
Lit. 281. 2.  
79. 80. 9.  
Ed. 4. 22. 3.  
H. 7. 16.

Co. 2. 8.  
super Lit.  
208.

Dier 77.

Adjudge  
20 Jac. B.  
Prescot's  
case.

21 Ed. 4.  
25.

Perk. f. 8.  
197. 799.

M. 2. Ja.  
B. R. Cr.  
denet M.  
fes case.

39 Eliz. B.  
Fitz. Bar.  
94.

Adjudge.  
39 Eliz.

Bro. Con-  
dition 14.  
Dier 17.  
Ed. 4. 3.

(1) A.  
—ice fur-  
(2) Se  
the oblig

it by request, and if he request it sooner, then it must be done in convenient time after request made. And yet if the thing to be done, be to be done wholly by the obligor, or a stranger, and doth nothing concern the obligee, as where the condition is that the obligor shall go to *Rome*, or that *I. S.* shall preach at *Paul's* cross, or the like; in the first case, it may be done at any time during the life of the obligor; and in the last case, it may be done at any time during the life of *I. S.*; and request in this case shall not hasten it.

Co. 2. 80.  
super Lit.  
208.

If an obligation be with condition to grant a rent, or an annuity, to the obligee during his life, to be paid at Easter, and no time is set for the doing of it; this rent must be granted before Easter next after the obligation, or else the obligation will be forfeit. And if the condition be to grant an advowson, and no time is set for the doing thereof; it must be done before the church become void, or otherwise the obligation shall be forfeit.

Dier 77.

If the condition be to do a thing upon a day in the year, and there be two days of that name in the year; in this case, it seems, it must be done that day that is furthest off from the time of the making of \* the obligation, especially if that day be the more notorious of the two days. \* P. 378.

Adjudged M.  
20 Jac. B.R.  
Prescot's  
case.

If the condition be to pay 10*l.* the eleventh of *May* next following, and the obligation is dated the 5th of *May*; in this case, the money must be paid the 11th day of the same month of *May*, and not of the next month of *May* (1).

22 Ed. 4.  
25.

If the condition be to stand to the award of *I. S.* and *I. S.* award money to be paid, but set no time for the payment of it; this must be paid in convenient time, else the obligation shall be forfeit.

Perk. sect.  
197. 799.

If one be bound to me in an obligation with condition, that, If I enfeoff him of *White-acre*, he will pay me 10*l.* but doth not say when; this must be done as soon as I make him the feoffment. So if one be bound to me that if the goods I have delivered to *B.* shall be lost, that *C.* shall satisfy me for them, and doth not say when; this shall be presently after the losing.

M. 2. Jac.  
B.R. Craul-  
denet Mor-  
ses case.

If the condition be to pay *I. S.* money when he shall come to the age of twenty-one years; in this case, it must be paid the very day *I. S.* doth come to his full age, and payment after is not a sufficient performance of the condition.

39 Eliz. B.R.  
Fitz. Barre.  
92.

If the condition be, to come at a day to such a place to do a thing, and the thing cannot be done without the concurrence of the other party; in this case, the obligor must stay until the very last instant of the day for his coming; and it seems also he must stay at the place all the day long.

Adjudg. Pas.  
39 Eliz.

If the condition be to pay a rent at Michaelmas or within twenty days after, the obligation is not forfeit before the twenty days be past.

Bro. Con-  
dition 145.  
Dier 17. 7.  
Ed. 4. 3.

If one be to do a thing on a day certain, he may do it any part of the day whilst the light doth last: and if the condition be to do a thing by, or before a day, it may be done the last instant of the day before, and it is sufficient (2).

(1) Adjudged accordingly *Cro Jac.* 646.—but a writ of error being brought, the parties compounded.—see further in *Buckley v. Guilbank*, *Cro. Jac.* 677.

(2) See accordingly *verbatim* in *Wood* 773—and more amply as to the time when the condition of the obligation is to be performed, *ante p.* 131.—also in *Bac. Abr.* Obligation (F. 4.)

3. In respect  
of the place  
where the  
thing is to be  
done.

If the condition of an obligation be to pay money, or do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done; in this case, it must be done to the person of the obligee wheresoever he be; and for this purpose, the obligor must at his peril seek out the obligee, if he be *intra quatuor mania*, otherwise the obligation is forfeit; but if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an annuity to another, and doth not set down where it shall be paid, and gives a bond with condition for the payment thereof; in this case, it must be done to the person of the obligee where ever he be: and the like law is, as it seems, where the thing to be done by the condition, is to be done by or to a stranger: but when the thing the party is bound by the condition to do is local, he is not bound to go any \* further, or to any other place, but to the place itself: and therefore if the condition be to make a feoffment of a piece of land, the party that is bound to do it, is not bound to go to any other place, but to the piece of land to do it: and if a man make a feoffment in fee, or lease for life or years of land, rendering rent generally, and gives an obligation with condition for the payment of the rent, the feoffee, or lessee, is not bound to go to any place from the land to seek the feoffor or lessor to pay him this rent.

\* P. 379.

If the condition be, to deliver twenty quarters of corn such a day to the obligee, and no place is set down where it shall be delivered; in this case, it is sufficient if the obligor, when the corn is ready, do give notice thereof to the obligee, and to wish him to appoint a place whereunto the obligor may bring it, and if he refuse to appoint a place, it is at his own peril; or the obligor may bring the corn to the house of the obligee (and this is the safest way) and if the obligee refuse it, the condition is performed, and the obligation is discharged (1).

4. In respect  
of the thing  
itself to be  
done.

If the condition be, to perform all the covenants in an indenture; this shall be taken as well for the covenants in law, as for the covenants in deed.

To perform  
covenants.

If a lease be made of a manor, excepting a close, and the lessee make an obligation to the lessor with condition, that the lessee shall perform *omnia & singula in scripto prædicto contenta*; by this the close shall be taken to be within the condition, so that if the lessee disturb the lessor in the close excepted, this shall be a breach of the condition.

To make a  
feoffment,  
lease, &c.

If the condition be, to make a feoffment to the obligee of land; in this case, the feoffment may be made with, or without writing, and if it be made by writing, it may be made without any warranty or covenants, and this will be a sufficient performance of the condition (2).

To make a  
release or  
other assur-  
ance.

If the condition be, that the obligor shall make a lease to the obligee for twenty years, and it is not set down when the lease shall begin, it shall begin presently.

If the condition be, that the obligor shall do any act upon request that the counsel of the obligee shall think reasonable,

(1) See further at what place a condition must be performed, in *Bac. Abr. Obligations* (F. 5.)

(2) Before the statute of 29 *Car. 2. c. 3.*—but since that statute a feoffment must be in writing as was observed before in *page 204.*



as for example, shall do any act, &c. for the releasing of an obligation, wherein the obligee is bound to the obligor, and the obligee by advice of counsel deviseth and requesteth a release of all demands to the obligee, and to *I. S.*; in this case, the obligor may refuse to seal it, albeit it be devised by the counsel of the obligee, because it is unreasonable, for it must be a reasonable act that the obligor by this condition is bound to do.

Adj. Hil. 39 Eliz. Co. B. If the condition be to pay 10*l.* at Michaelmas next, and 10*l.* To pay mo- yearly after, until *I. S.* be made knight; in this case, albeit *I. S.* ney or rent. be \* made knight before Michaelmas, yet the first 10*l.* at Michael- \* P. 380. mas must be paid.

Adj. M. 18 Jac. B. R. If the condition be thus, that if the obligor shall for ever pay yearly to the obligee, &c. 10*l.* at the two usual feasts by equal portions, or if his heirs shall at any time hereafter pay 100*l.* at one payment to the obligee, that then the obligation to be void; in this case, albeit the obligor hath election, which of these two things to do; yet because the intent is apparent that one of these things should be done, if therefore the 100*l.* be not paid before the first feast, the 10*l.* must be paid yearly.

Dier 42. 43. If the condition of an obligation from *A.* to *B.* be thus; that whereas *A.* hath sold to *B.* certain meadow in *Dale*, that the said *A.* shall warrant the same against the Lord and King and all others, if the said *B.* shall peaceably enjoy it to him, and his heirs of the Lord of the manor of *M.* by the services due after the custom, &c. in this case, the substance of this being for quiet enjoying, it shall be extended that way, and albeit it be not said what he shall warrant, yet it shall be taken to be the land in question, and the warranty shall be construed to last only for the life of *B.* and not to extend to any new titles after the covenant, especially such as are by the act and default of the obligee himself, as if he commit a forfeiture and the Lord enter, or the like. To warrant land and for quiet enjoy- ing.

Perk. sect. 791. 10 Ed. 4. 11. Gold's case in Herbert's Rep. 127. If the condition be, that the obligor shall sufficiently prove such a thing; this shall be taken for proof by inquest, and accordingly it must be done: but if the condition be that it shall be done by such a time, or before such persons, as when or where such proof cannot be had, then it is otherwise. Where the word [proof] is put generally, it shall be understood of proof by justice; but when the parties agree upon another form of proof, that shall prevail against that which is but instruction of law. To prove a thing.

Curia Trin. 7 Jac. Co. B. If one be bound in an obligation with condition to suffer his wife to give to her kinsfolks, children, or others, portions of his goods to the value of 100*l.* and that he will perform it, and she give part to one and part to another; in this case, the husband must perform it accordingly: but if the condition be to suffer her to give to *A.* and *B.* 100*l.* and that he will perform it, and she give 100*l.* to *A.* he is not bound to perform this. To suffer his wife to make a will.

Adj. Hil. 7 Jac. B. R. If the condition be, that he shall perform his wife's will, so it do not exceed 20*l.* and she make a will and devise 100*l.*; in this case, he is not bound to perform the will for the twenty pounds. 5. In respect of the manner and order of doing the thing and other matters.

Kelw. If the condition of an obligation be, that the obligor shall infeof the obligee, and such others as he shall name, by a day; in

in this case, the obligee must do the first act, *viz.* name the others; otherwise the obligor doth not forfeit his obligation by the not doing of it: but if the condition be to infeoff me, or such others as I shall name, before such a day; in this case, if I do not name others, it seems he must infeoff me before the day at his peril.

\* P. 381.

If the condition be, that the obligor shall make such an estate of land as *I. S.* shall advise; *I. S.* must first advise, and this must be made known unto the obligor ere he is bound to any thing, and if he never advise, he is never bound to do any thing; for it is in this case, as if one be bound to stand to the award of *I. S.* and *I. S.* never make any, or make a void award, which is all one.

If the condition be, to make such a discharge in such a court as the obligee or his counsel shall advise; in this case, the obligee must do the first act, *viz.* advise and give notice of the advice to the obligor before he is bound to do the thing. But if the condition be to make such a discharge in such a court such a day, as the judge of that court shall advise; in this case, the obligor must at his peril procure the judge to advise a discharge, and it must be done that very day, or the obligation will be forfeit.

If the condition be, to pay 20*l.* to the obligee when he doth come to *London*; in this case, the obligee must do the first act, *viz.* make known to the obligor when he doth first come to *London*, for otherwise, it seems the obligor is not bound to pay the money.

If the condition be, that the obligor shall levy a fine to the obligee before such a day, the obligee must do the first act, *viz.* sue out the writ of covenant.

If the condition be, that the obligor shall deliver twenty cloths to the obligee such a day, the obligee paying for every cloth immediately after the delivery 20*l.*; in this case, the cloths must be delivered, albeit the obligee refuse to pay the money; but if [immediately after] be left out, it seems the obligor is not bound to deliver the cloth unless the obligee first pay the money.

If the condition be, that the obligor and his heirs shall at any time, upon request made, do any act, &c. that the obligee shall require, &c. and the obligee tender a release or other deed to seal; in this case, if the obligor, or his heir that is to seal the deed, be an illiterate man, he may refuse to seal it, until he can get some body to read it unto him; but he may not refuse or delay to seal it until he can have a lawyer's advice upon it, for thereby he will forfeit his obligation.

If the condition be, to any thing upon request; the obligor until request made is not bound to do any thing towards it, neither can he forfeit his obligation till then. And yet if, in this case, the obligor disable himself to do the thing he hath undertaken to do upon request, before the request made, the obligation may be forfeit without any request made.

\* P. 382.

\* If the condition be, that the obligor shall within a certain time surrender such land of his, for an annuity of so much as they shall agree upon, and they agree upon 10*l.* per annum; in this case, the obligor is not bound to make the surrender until the annuity be made and tendred unto him.

If

Hil. 37 Eliz. Co. B. Gree- ingham's case adjudg. If the condition be, to deliver to the obligee an obligation wherein the obligee is bound, &c. or to seal and deliver to the obligee such a release of it as shall be devised by the counsel of the obligee before Michaelmas, and the counsel do not advise any release before Michaelmas; in this case, the obligor is discharged of the obligation, for the obligee is to do the first act.

Trin. 4. Jac. B. R. If *A.* be bound to *B.* in an obligation with condition, that *A.* and his wife shall levy a fine of land to *C.* and *D.* and their heirs, and at their costs and charges; this shall be construed to be at the costs of the obligor, and not at the costs of the cousees, but if the word [and] be omitted, perhaps it may be otherwise.

Dier 17. If the condition be thus, that if the wife die before Michaelmas without issue of her body then living, that the obligation shall be void; in this case, [then living] shall relate *ad proximum antecedens*, and not to the death of the wife, and therefore if she hath issue and die, and after, before Michaelmas, the issue dyeth also, the obligation is void.

Gold's case. M. 13 Jac. If the condition be, that if the obligor shall waste the goods of the obligee (his master), and this waste within three months after due proof of it, either by confession or otherwise, be notified to the obligor, that the obligor shall satisfy the obligee for it, and the obligor do confess the waste under his hand and seal; in this case, it seems, this proof though it be *extrajudicial* is sufficient.

Co. 5. 22. super Lit. 207. Dier 262. 12 H. 7. 2. 4 H. 7. 4. When the condition of an obligation is to do two things by a day, and at the time of making of the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case, the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor, or a stranger, the obligor must see that he do the other thing at his peril. And when the condition of an obligation is to do one single thing which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be.

21 Ed. 3. 29. \* If the condition be, to do one of two things, as to make a feoffment to me, or pay me 20*l.* in this case, if the obligor do either of them, it is sufficient. But if the condition be in the copulative, as to enfeoff me and pay me 20*l.* in this case the doing of one of them will not suffice, but he must do both. \* P. 383.

Per Justice Dodridge M. 2 Car. B. R. If the condition be, to pay to *A. B.* and *C.* 30*l.* a-piece within a week after they come to eighteen years of age, or within forty days after their days of marriage after notice given thereof, which shall first happen; in this case, this notice must go to both the parties, so that notice must be given when they are eighteen years of age; otherwise, and until notice given, it



seems the obligor is not bound to pay the money. See more in *Condition, numb. 8. and Covenant, numb. 6.*

2. When the condition of an obligation shall be said to be performed, and the obligation favored; or not.

To make a feoffment.

Tender and refusal.

The matter of a condition of an obligation is sometimes affirmative and compulsory, and doth consist of something to be done, and sometimes it is negative and restrictive, and doth consist of something not to be done; the not doing in the first case, and the doing in the latter case, causeth the obligation to be forfeit; and the doing in the first case, and not doing in the latter, saveth the obligation.

If one be bound in an obligation to me, with condition to enfeoff me of land, and the obligor do first make a lease to me of it, and afterwards he doth make a release of it to me and my heirs; this is a good performance of the condition.

If a condition be to make me a feoffment of land, and he tender me a feoffment, and I refuse it; by this the condition is performed. So if the condition be, to make a feoffment to my use, and when it is made I refuse it; this is a good performance of the condition. But if a man bind himself in an obligation to me, with condition to make feoffment to a stranger and he tender the feoffment to the stranger, and he doth refuse it; this is no good performance of the condition, but the obligation is forfeit. If the condition be, to enfeoff me and my wife, and he tender it to me, and I refuse it; it seems this is a good performance.

If one bind himself in an obligation to me, with condition to make me a feoffment of the manor of *Dale* by a day, and he, before the day, grant a rent-charge out of the same manor to a stranger, and afterwards, and before the day also, he doth make me a feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the obligor sell away part of the manor before, or make a feoffment to me but of a moiety or a third part of the manor; this is no good performance of the condition. And if in this case, the obligor before the day take a wife, and before the day make his feoffment according to the condition, but the marriage doth continue until after the day; in this case, it seems the condition is broken.

\* P. 384. \* If the condition be, that the obligor shall enfeoff me of the manor of *Dale*, and he make a feoffment of the manor of *Salé*, and I accept thereof; it seems this is no performance of the condition, and that my acceptance in this case will not help. So if the condition be to make me a feoffment of land, and he give me money, a horse, or the like, in recompence of this, and I accept thereof; this is no good performance of the condition: and the like law is in all cases where the condition is to do any collateral thing, as to account, build a house, enter into a recognizance, or the like, and the obligor doth give, and the obligee accept, some other thing in lieu thereof: and so also it is where the condition is to make a feoffment to a stranger, and the obligor give, and the stranger take, another thing in lieu thereof: but if the condition be to enfeoff me of land such a day, and he make, and I take, the feoffment before the day; this is a good performance of the condition.

If the condition be to enfeoff me or my heirs in the disjunctive, and the obligor enfeoff me and my heirs; this is a good performance of the condition; for it is impossible to enfeoff my heirs whilst

whilst I live, and when two things are to be done by a condition, whereof the one is possible at the time of making the obligation, and the other is not; in this case, it is sufficient if he do the thing which is possible.

11 Ed. 3. 39. If the condition be, to make me a feoffment, or pay me 20*l.* if the obligor do either of them, it is sufficient. But if the condition be to infeoff me, and pay me 20*l.* in this case, the obligor must do both, or the condition will not be performed: *Et sic de similibus.*

Perk. sect. 776. Kelw. 95. If the condition be, that the obligor shall make me a sufficient estate of land by the advice of *W.* and *S.* and they advise an insufficient estate, and the obligor do make the estate according to that advice; this is a good performance of the condition: but if the condition be that the obligor shall make a good and sure estate, and he by advice of counsel make an estate that is not good and sure; this is no good performance of the condition.

Fitz. Barre 55. If the condition be, that the obligor shall make me an estate of land, and make the estate to another by my appointment; it seems this is no performance of the condition.

Trin. 17. Ja. B. R. If the condition be, that the obligor or his feoffees in trust shall make an estate to the obligee such a day, and the feoffees do it without the consent of the obligor; this is no performance of the condition.

Pasche 8. Ja. Co. B. If the condition be, to make further assurance, and the obligor make further assurance upon condition, without the agreement of the other party; this is no good performance of the condition.

37 H. 6. 18. Perk. sect. 792. If the condition be, to save me harmless from an annuity where with my land is charged, and the obligor doth pay the same yearly, and get me an acquittance for the same from the party; this is a good performance of the condition. But if the condition be to discharge me of such an annuity; in this case, payment, and procuring me a release, is no good performance of the condition.

Perk. sect. 790. Fitz. Barre 7. If the condition be, that the feoffees or lessees of the obligor such land which they have in trust, shall grant me a rent-charge, or release their right to me before such a day, and there be three feoffees; or lessees, and two of them only do grant this rent or make this release; this is no good performance of the condition.

Dier 15. If the condition be, that the obligor shall purchase and procure to me and my heirs a rent of 5*l.* per annum, and a stranger hath such a rent out of my land, and he doth get him to release this to me; this is a good performance of the condition: and if one be bound with condition to grant me the rent and farm of such a mill before Michaelmas, to be had and perceived until I be paid 10*l.* and before that time he lease the mill to me at a rent, and then suffer me to detain so much of the rent; it seems this is a good performance of the condition.

Co. super Lit. 207. If the condition be to deliver me a horse, and the obligor tender the horse unto me, and I refuse him; hereby the condition is performed; and so in all such like cases where the obligor is to do any collateral thing, as stand to an award, or the like; if the obligor offer to do it, and the obligee refuse, the condition is performed, and the obligation discharged for ever.

Dier 17. super Lit. 202. Bro. Condition 145. If the condition be, to pay money at a day certain, and the obligor pay a little before night, time enough for the receiver to

see to number his money by day-light; this is a good performance of the condition. And if the condition be to pay money by or before a day, payment in the last instance of the day before, is a sufficient performance of the condition (1)

**Acceptance.** If the condition be to pay me a sum of money at a day certain, Perk. fecd. 748. and the obligor pay me less money before the day, or all the money before or at the day, or give me something else before or at the day of payment in lieu thereof, or pay me all the money or a lesser sum at the day appointed, but in another place, and not the place mentioned in the condition, and I accept thereof; in all these cases, the condition is well performed. But if a stranger to the condition do so, and I accept thereof; this is no good performance of the condition, as hath been adjudged. 34 H. 6. 17. 21 Ed. 3. 13. Co. 5. 117. 9. 79. Bro. Obl. 64. And if the obligor pay less than the whole money at the day of payment, and the obligee accept thereof; this is no good performance of the condition: and if the thing to be done be a collateral thing, as to account or the like, and the obligor give unto the obligee money, or a horse in lieu thereof, and the obligee accept it; this is no good performance \* of the condition. Trin. 35. Eliz. 7. Adjudged 7 Eliz.

\* P. 386. And if the obligor pay the money to the obligee after the day of payment; this is no performance of the condition, but the obligation is forfeit, and the money paid shall go in part towards the forfeiture: and yet in this case, the defendant at this day, being sued upon this obligation, doth usually adventure to plead conditions performed, and give this special matter in evidence to the jury, who for the most part doth find against the obligee. And yet if the condition be, to pay me money at a day certain, or to pay another money at a day certain, and the obligor pay me or the stranger at several times before the day, and I, or the stranger, accept thereof; this is a good performance of the condition. But if the obligee do only promise to accept of a horse for his money at the time of payment, and when the time of payment comes, and a tender of the horse is made to him, he doth refuse him: this tender is not a sufficient performance of the condition. Dier 18. 18 Ed. 4.

**Tender and refusal.**

If the condition be, to pay money at a day and place certain, and the obligor tender it at the time and place, and the obligee is not ready to receive it; or, being ready, doth refuse to receive it; Co. super Lit. 208. 209. this is a good performance of the condition to save the forfeiture of the obligation: and yet, if the obligor be afterwards sued for this money, he must say in his pleading, that he is still ready to pay it, and he must tender it in court. But if one be bound by a single obligation to pay money, and after at the same or some other time, he hath a defeasance from the obligee, that upon payment of a lesser sum the obligation shall be void, and the obligee refuse the money when the same is tendred, at the time when by the defeasance it is to be paid; in this case, the obligor is not bound to tender the money in court, neither hath the obligee any remedy for it. 27 H. 8. 10. Perk. fecd. 784.

(1) And if the money was not paid at the day, the bond became forfeited, and the whole penalty became recoverable at law: and the obligor was obliged to have recourse to a Court of Equity, which would restrain the obligee from taking more than in conscience he ought, *i. e.* his principal, interest, and costs. — The stat. of 4 Ann. c. 16. §. 13. affords the like assistance to obligors, as the 7 Geo. 2. c. 20. (mentioned before in note 2 to page 137.) does to mortgagors; for it enacts, that if at any time, pending an action on bond with a penalty, the defendant shall bring into court the principal, interest, and costs, the money so brought into court shall be in full discharge of the said bond, and the court may give judgment for the defendant accordingly.



41 Ed. 3. 25. If the condition be, to pay me money at a day and place certain, and the obligor doth tender it to me the same day in another place, this is no performance of the condition; and therefore in that case I may refuse it.

Dier 17. If the condition be, to pay money between two days; payment of the money upon either of those days, is not a good performance of the condition; but the payment must be between the two days.

Perk. fecit. 748. 27 H. 6. 6. Fitz. Barre 43. If the condition be, to pay me money at a day certain, and I bid the obligor pay the money to one that I do owe so much more unto; or I bid him lay out the money for me; or I bid him keep it for such a debt I owe unto him; and he do so, and I accept hereof; it seems this is a good performance of the condition.

*query whether the first day be not good*

If the condition be to pay me money, and I appoint another \* to receive it, and the obligor pay it unto him; this is a good \* P. 387. performance of the condition.

Co. super lit. 208. 209. Dier 56. If the condition be, that a stranger shall pay to the obligee 10*l*. Acceptance. and the obligee accept a horse for it; this is a good performance of the condition. But if the condition be, that one stranger shall pay to another stranger 10*l*. and the one doth give, and the other take, a horse in lieu of this; this is no good performance of the condition.

New terms of the law. A. Coin. a Per Just. Bridgman & Caria in the Marches of Wales 8. b Terms of the law, Idem. If the condition be, to pay me 20*l*. of lawful English money, and the obligor pay me in Spanish or in any other money current in this realm; this is a good performance of the condition. <sup>a</sup> But payment in farthings is no good payment (1). <sup>b</sup> If the condition be, to pay me 20*l*. and the obligor pay me some of the 20*l*. in counterfeit pieces, which I, not perceiving at the time, do put up and accept, but after upon a review I do perceive some of them to be naught, and thereupon I do send it back to him again; in this case, it seems the condition is well performed, and therefore the sending back of the money again will not cause a breach afterwards.

22 Ed. 4. 2. If the condition be, that I shall stand to the award of I. S. To stand to and he doth award me to pay 20*l*. to W. S. by a day, and at the an award. day I do tender him the 20*l*. but he doth refuse it; in this case, I have sufficiently performed the condition, and the obligation is saved.

21 Ed. 4. 25. If the condition be, that I shall stand to the award of I. S. and he award that I shall enter a *Retraxit* in a suit depending between me and the other party, and I do not so, but am non-suit, or do discontinue my suit; this is no good performance of the condition.

21 Ed. 4. 40. If the condition be, that the obligor shall come such a day to To shew a such a place, and shew me a release, and he doth come to the release. place the latter part of the day, and doth stay there until the light of the day be gone, ready to shew his release, but I come not thither; this is a good performance of the condition.

Dier 255. 17 Ed. 4. 3. If one make a lease of land to me, and bind himself in an obligation with condition, to suffer me quietly to enjoy the land For quiet enjoying. without the let of him or any other; in this case, if neither he himself, nor any other by his incitement, do disturb me, the condition is performed; and if a stranger that hath title, do enter

(1) See accordingly *Wood's Inst.* 292.—Money of England must be either of gold or silver, 2 *Inst.* 577.

- quere* without his procurement or occasion, this is no breach of the condition.
- To appear. If the condition be, to appear in the King's-Bench such a day, *Park. sed.* to answer *I. S.* and at the day the obligor doth appear, but the *760. 758.* plaintiff is effoined, so that the defendant cannot answer him; or *2 Ed. 4. 3.* the suit is discontinued by the demise of the King before the day of appearance; in these cases, the condition is performed and the obligation saved. But if the obligor in this case, when he doth
- \* P. 388. \* appear, doth not cause his appearance to be entred of record, the obligation is forfeit.
- If the condition be to appear *coram domino rege*, and the obligor *8 H. 4. 6.* appear before the King's person; this is no performance of the condition. And if the condition be, to appear *coram justiciariis domini regis*, and the obligor appear before them out of court; this is no performance of the condition.
- To make a bond. If the condition be, that a stranger shall make an obligation to *Co. super* the obligee, and the stranger tender it, and the obligee refuse it; *Lit. 208.* this is a good performance of the condition: but if the condition *209.* be, that the obligor shall make an obligation to a stranger, and the *10 H. 6. 16.* obligor tender it, and the stranger refuse it; this is no performance *27 H. 8. 1.* of the condition.
- To marry a woman. If the condition be, that the obligor shall marry the daughter *Perk. sed.* of the obligee by a day, and he doth tender himself, and she doth *756.* refuse; in this case, the obligation is forfeit, notwithstanding this *4 H. 7. 3.* tender and refusal.
- To leave possession. If the condition be, to deliver the key of a house, and the quiet *Dier 219.* possession to *I. S.* to the use of the obligee, and the obligor (the house being rid, and every one out of the house, and the door locked) doth deliver the key to *I. S.*; it seems this is no good performance of the condition, but that *I. S.* or the obligee, or his deputy, ought to come and receive the possession. See more in *Condition at numb. 9. and Covenants 6 (1).*
9. When a single obligation shall be said to be broken and forfeit, or not. *As how* If an obligation that is single, be not performed; as when it is *Co. 8. 153.* to pay money at a day, and the money is not paid; the obligation *super Lit.* is broken. But if a man be bound by an obligation to pay money *292.* at several days, the obligation is not forfeit, nor can be sued, until *F. N. B.* all the days be past. And yet if the condition of an obligation *267.* be to pay money at several days, and the obligor do fail to pay the money the first day; in this case, the obligee may sue for the money due by the obligation presently.
- If one be bound to pay money at a day certain by a single obligation or bill, and the obligor tender the money at the day to the obligee, so as he will give him his bill or a release for the money, and the obligee refuse so to do, and thereupon he doth refuse to pay the money; in this case, the obligation is not forfeit; for, in this case, the obligor is not bound to pay the money, unless the obligee will give up his bill, or give him a release. But otherwise it is in case where one is bound to pay money by the condition of an obligation; for there the obligor must pay the money at his peril, albeit the obligee refuse to deliver up the obligation, or to give him a release.
- If one be bound to pay money on a single bill at a day, and the obligor tender the money at the day to the obligee, and he

(1) See accordingly *verbatim* in *Wood 776 to 779.*—and more amply as to the performance or the breach of a condition in obligations—in *Bac. Abr. Obligations (F. 1.)*—*Vin. Abr. Condition (Q. 2.)*

refuse \* it; in this case, it seems, he hath no remedy for his money; *Sed quære.* \* P. 389.

Bro Oblig.  
17.

In all cases when the condition is not performed, or is broken, the obligation is forfeit, and till then it cannot be forfeit: and therefore, if one be bound in an obligation, with condition to pay me 10*l.* at Easter; before the day come, the obligation cannot be forfeit; but if it be not paid at the day, the obligation is forfeit: and yet if the obligee himself be the cause of the breach of the condition, or the thing to be done by the condition is now become impossible by the act of God, the obligation is now become without penalty: as if in the old days I had been bound in an obligation to an Abbot, that *A.* should infeoff him before Christmas; if *A.* enter into religion, my bond had been presently forfeited: but otherwise it had been, if *A.* had been professed under the obedience of the obligee himself.

10 When the condition of an obligation shall be said to be broken, and the obligation forfeit; or not.

To make a feoffment.

Perk. sect.  
768, 769.

If the condition be to make a feoffment of land to me such a day, and he be not upon the land ready to make the feoffment; albeit I come not there to receive it, yet the condition is broken.

21 Ed. 3. 29.  
Co. 5. 112.

If the condition be that, when the obligor shall come to his aunt, he will infeoff the obligee, or the heirs of his body; in this case, he must do it as soon as he doth come to her and the obligee shall request the feoffment, or the obligation is forfeit.

21 Ed. 4. 55.

If the condition be to infeoff me of a manor by a day, and before the day the obligor doth make a feoffment of it to another; hereby the condition is broken, and the obligation forfeit: and though the obligor repurchase it again before the day, and then make the feoffment, yet this will not cure the breach.

4 H. 7. 4.

If the condition be, to infeoff *B* and *C.* and one of them die before the time be past wherein it should be done; in this case, he must infeoff the survivor of them, or the condition is broken.

Dier 347.

If the condition be, that if the obligor before Michaelmas make a lease to the obligee for thirty-one years, if *A.* will assent, and if he will not assent then for twenty-one years, that then; &c. if *A.* do not assent, and the lease for twenty-one years be not made before Michaelmas, the obligation is forfeit.

To make a lease.

7 H. 6. 24.

If the condition be, that the obligor shall make me an estate upon request, and he tender me an estate before I request it, and afterwards I do request it, and he doth refuse it; in this case, the condition is broken, and the obligation forfeit.

To make an estate.

Pasche 8.  
Co. B. Jac.

If the condition be, that the obligor shall make me a good estate of land (being copyhold land) and he doth surrender it absolutely, and the homage, when they present it, do present it conditionally; this is no breach of the condition.

4 H. 7. 4.  
Kel.

\* If the condition be, to make a good estate of land in fee-simple to *A.* (a woman) before such a time, and before such time the obligor taketh *A.* to wife; and the day pass, and no estate is made; in this case, the condition is broken, and the obligation forfeit. But if the obligation be made, to the woman herself, then it is dispensed with by the inter-marriage.

\* P. 390.

Co. 2. 3.  
Dier 337.

If the condition be, that the obligor and his son shall do all such acts for the better assuring of land, as the obligee or his counsel shall devise; and the obligee devise and tender a release to the obligor and his son to seal, and they delay and refuse to seal it, until they can shew it to their counsel to be advised upon it; this is a breach of the condition: but if they be illiterate and

To make further assurance.



and refuse to seal it until they can get it read; this is no breach of the condition.

To save  
harmless,

If the condition be, that the obligor shall save the obligee harmless from such a debt, for which the obligee is surety for the obligor, and the obligee cometh at the time, and to the place, when and where the money, for which he is engaged, is to be paid, and finding no body ready to pay the money, he doth pay it himself to save the forfeiture of the obligation; hereby the condition to save harmless is broken, and the obligation forfeit. And therefore much more if the obligee be sued, arrested, outlawed, or taken in execution for the debt of the principal: so also if the obligee be put in fear of arrest for the debt of the principal, and therefore dare not go about his business; by this the condition is broken. But if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise; or if the bond, in which he is bound, be against law and void; and he suffer himself to be unjustly vexed thereupon and doth not take advantage of it; it seems this is no breach of the condition of the bond to save harmless.

If a bailiff distrain beasts on a *withernam*, and afterwards re-deliver them to the party of whom he had them, and take a bond from him with condition to save him harmless from him for whom the beasts were taken, and after he doth bring a detinue against the bailiff for the beasts; in this case, the condition is not broken; for this action will not lie in this case.

To pay money.

If the condition be to pay money to me at a day and place certain, and the money is not tendered at the time and place; albeit there be no body ready to receive it, if it be tendered, yet the condition is broken.

If the condition be to pay money to me at a day and place, and the obligor in his going to the place is robbed of the money so as he cannot pay him; in this case, notwithstanding, the condition is broken, and the obligation forfeit, and this will not excuse it.

\* P. 391.

\* If the condition be to pay money to me at a day and place, and I, seeing him going to the place to pay the money, do wish him to forbear, and thereupon he doth so, and doth not pay it; in this case, the obligation is forfeit, and this will not excuse. But if I do violently and actually detain and hinder him, so that he cannot pay it, this will excuse him.

To pay rent.

If the condition be to pay me the rent reserved on such a lease, at the times limited by the lease, and it be not accordingly; hereby the condition is broken, albeit I do never demand the rent.

If the condition be to pay me the rent reserved on such a lease, and I enter upon all or part of the land demised, so as the rent is suspended so long as I keep the possession; in this case, the non-payment of the rent during the time of the suspension of the rent, is no breach of the condition.

For quiet  
enjoying.

If the condition be that I shall enjoy land without the interruption of any person whatsoever, and afterwards I do forfeit it myself by non-payment of rent, or the like; this is no breach of the condition.

If the condition be, that the obligor shall suffer the obligee to enjoy lands, &c. and that without the let of him, &c. or any other person or persons, &c. and one that hath an elder title doth enter; this is no breach of the condition. But if he procure this entry and disturbance, this is a breach of the condition.

If

- Kelw. 60. If the condition be, that *B.* and others shall quietly enjoy land, and *A.* the obligor and *B.* the obligee doth disturb the others; it seems by this disturbance the condition is broken.
- Co. 9. 51. If the condition be, that the obligor shall not disturb me in the keeping of my courts, and he keep the courts and take the fees himself; this is a breach of the condition.
- Co. super Lit. 384. If one make a feoffment of land to me, and make me an obligation with condition to defend the land for twelve years, &c. and I am entered on by a stranger, but never impleaded; in this case, the condition is broken.
- Co. 4. 61. 8. 83. If the condition be, to stand to the award of *I. S.* and the obligor doth afterward countermand the submission made to *I. S.* this is a breach of the condition. *Factum non dicitur quod non perseverat.* To stand to an award.
- Co. 8. 82. 83. 18Ed. 4. 20. If the condition be, that I shall have licence to carry wood seven years, and the obligor doth give me a licence for seven years, and then doth revoke it again; this is a breach of the condition. To give a licence.
- 18Ed. 4. 23. If the condition be, that *I. S.* shall give me licence to go over his ground, and *I. S.* doth so, but another doth interrupt me; this is no breach of the condition. And yet if the condition be, that I shall have licence to go over that ground, there perhaps such an interruption \* may be a breach of the condition.
- Fitz. Barre 60. If an obligation be made to me with condition, to appear in such a court such a day, and at the day he is kept in prison at my suit so as he cannot appear; in this case, his non-appearance is no breach of the condition, for his imprisonment shall excuse him. But if his imprisonment be for felony, or any other such like cause of his own, *contra.* \* P. 392. To appear.
- Dier 25. If the condition be, to appear in such a court such a day, and before the day a *Superfedeas* doth come to the sheriff; yet, if the obligor do not appear, the obligation is forfeit.
- Perk. fec. 1. If the condition be, that the obligor shall ride with *I. S.* to *Dover* such a day, and *I. S.* doth not go thither that day; in this case, it seems, the condition is broken, and that he must procure *I. S.* to go thither and ride with him at his peril. To ride to Dover.
- Per Just. Nichols M. 13. Ja. If I make a lease for years, and the lessee doth enter into an obligation with condition that he shall not alien the land demised without my licence, and I die, and then he doth alien it; it seems this is a breach of the condition. Not to alien.
- Perk. fec. 772. 6 Ed. 4. 2. If the condition be, that *I. S.* shall serve me in all my honest and lawful commands; or that *I. S.* shall be a good and honest servant to me one year; in the first case, if I command him nothing, the condition is not broken, albeit he never tender his service; but in the last case, it seems he is to tender his service to me, or otherwise the condition will be broken. But if I refuse his service when it is tendered, or he die within the time, the obligation is discharged. And yet if he depart away within the time, the condition is broken. To serve.
- 4 H. 7. 4. Perk. 799. If the condition be, that *A.* shall marry *B.* by a day, and before the day the obligor himself doth marry her: in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged. To marry a woman.
- Bliscoe's case Trin. 9. Ja. B. R. If the condition be, to perform the covenants and payments of a deed, and the deed doth contain a feoffment, and this is on condition that if the feoffor pay such a sum of money he shall re-enter, and he doth not pay it; in this case, this non-payment is

is no breach of the condition. But if *A.* let land by indenture to *B.* for years rendring rent, and *B.* doth bind himself in an obligation with condition to perform all the covenants contained in the indenture, and the rent is unpaid; this is a breach of the condition, and cause of forfeiture of the obligation.

To keep  
prisoners.

If the condition be for the safe keeping of prisoners, and one doth escape that is in execution, and in prison under colour of an execution, or the like, but in truth and in judgment of law is no prisoner; this escape is no breach of the condition. See more in *Condition*, at numb. 10.

\* P. 393

11. By what means and when an obligation, good in its original creation, doth or may become void, be discharged or gone, by matter *ex post facto*: or not.

\* If the condition of an obligation consist of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are possible at the time of the making of the obligation, and before the time of performance one of the things is become impossible to be done by the act of God, or by the act of the obligee himself; in this case, the obligation is discharged for ever. And therefore if the condition be, that if the obligor shall sell away his wife's land, if then he shall either in his life-time purchase to his wife and her heirs and assigns, land of as good right and value, as the money by him received or had by or upon the said sale shall amount unto, or else do and shall leave unto her by legacy, or otherwise, as much money as shall be by him received upon such sale, that then, &c. and the obligor doth sell his wife's land, and then his wife doth die before him, so that he cannot leave her the money; in this case, the obligation is discharged, and the husband is not bound to purchase land to her and her heirs. So if the condition be, that if *I. S.* do not prove the suggestion of a bill depending in the court of requests before the utas of Hilary, that then he shall pay 20*l.* &c. and *I. S.* die before the utas; hereby the obligation is discharged for ever, and he is not bound to pay the 20*l.* So if the condition be, that if the obligor appear in the King's-Bench in Easter term, or pay 20*l.* to the obligee at Michaelmas, and the obligor die before Easter term; hereby the obligation is discharged: but if he do not appear in Easter term and outlive the term, and die after; then it seems the 20*l.* must be paid at Michaelmas, or the obligation is forfeit. So if the condition be, that the obligor shall marry *A.* before Easter, or pay 20*l.* to the obligee at Michaelmas, and *A.* die, or become mad before Easter, or the obligee marry *A.* himself, and the marriage doth continue between them until Easter be past; in all these cases the obligation is discharged for ever. But when the thing is become impossible by the act or laches of the obligor, the law is otherwise. And therefore if the condition be, that *A.* shall marry with *B.* before Easter, or that the obligor shall pay unto the obligee 20*l.* at Michaelmas, and the obligor himself marry with *B.* and the marriage doth continue until after Easter; hereby the obligation is not discharged. So if the condition be to deliver up an obligation before Easter, or give a release at Michaelmas, and the obligor doth loose the obligation, or the obligation is burnt; hereby the obligation is not discharged, for if he doth not make the release at Michaelmas, he doth forfeit the obligation.

(1) See further how conditions in the disjunctive are to be performed, *Bac. Abr. Obligations* (F. 2.)

8 Ed. 4.  
Co. 5. 22.  
Perk. 168.  
769. 757.  
H. 7. 4.  
Ed. 4. 27.

Adjudged  
Griffin and  
Scott's case  
5. Jac. B.R.

Curia Trin.  
37 Eliz.

Co. super  
Lit. 207.

Co. 5. 22.  
15 H. 7. 2.

So held in  
the Exche-  
quer. 3 Cu.

Curia Co.  
B. Hill 37  
Eliz.

Dyer 162.  
15 H. 7. 4.  
4 H. 7. 4.  
Agree 9.  
Jac. in Ba-  
thurst case.

Adjudged  
37 Eliz.  
Co. B.  
Greening-  
ham versus  
Ewre.

Pro Oblig.  
688. 29. 4.  
H 7. 6.

Co. 5. 119.

Fit. Bar. 37.



8 Ed. 4. 21. If the condition of an obligation consist of one part only, or be  
Co. 5. 22. to do one thing at a time certain, and that thing at the time of  
Perk. sect. the obligation made is possible to be done, but afterwards, and be-  
769. 757. 6. fore the \* time when it is to be performed, it doth become impos- \* P. 394.  
H. 7. 4. 24. sible by the act of God, or the act of the obligee; in this case  
Ed. 4. 27. also, the obligation is gone and discharged for ever. And there-  
fore if the condition be to appear in person such a day in such a  
court, and before the day the obligor die, or at the day the water  
doth arise so high that he cannot travel to the place without peril  
of life; in these cases, the obligation is discharged. So if the  
condition be, that *A.* shall marry *B.* before Easter, and before the  
time *A.* or *B.* die, or become mad, or the obligee marry *B.* and  
the marriage doth continue until after the day; in all these cases,  
the obligation is discharged. But if the thing become impossible by  
the act of the obligor, *contra.* And therefore if the condition be,  
that the obligor shall appear such a day, and before, and at the  
day, he is imprisoned through some default of his own so that he  
cannot appear, this will not excuse him, no more than in case  
where he is so sick that he cannot appear without peril of his life.

So held in  
the Exche-  
quer. 3 Cur.

Curie Co.  
B. Hill 37.  
Eliz.

Adjudged  
37 Eliz.  
Co. B.  
Greening-  
ham versus  
Ewre.

Bro Oblig.  
6 88. 29. 4.  
H 7. 6.

If the condition be, that the obligor shall deliver to the obligee  
an obligation, or such a release as the counsel of the obligee shall  
devise, before Michaelmas, and the counsel of the obligee devise  
no release before Michaelmas; hereby the obligation is gone for  
ever.

If the obligation depend upon, or be necessary to, some other  
deed, and that deed become void, in this case the obligation is  
become void also; as if the condition of the obligation be, to  
perform the covenants of an indenture, and afterwards the cove-  
nants be discharged or become void; by this means the obligation  
is discharged and gone for ever. And if one make a lease for  
years, rendering rent, and the lessee enter into an obligation with  
condition to pay the rent to the lessor, and after it fall out so that  
the lessee is evicted out of the land by an elder title, whereby the  
rent in law is gone; in this case, and by this means, the obligation  
is discharged and gone also. But if the eviction be but of a part  
of the land, *contra.*

*Stevenson v Lambson*  
2 East 575.

Co. 5. 119. If an obligation be made to me, and delivered to *I. S.* to my  
use, and, when it is tendred to me, I do refuse it and disagree  
to it; hereby it is become void, and cannot afterwards be made  
good again. So if an obligation be made to my wife, and I disa-  
gree to it; hereby it is become void.

Fit. Bar. 37. By a release made from the obligee to the obligor, or to one  
\* of the obligors if there be more than one, the obligation may \* P. 395.  
be discharged. And therefore, if an obligation be made to me  
with condition to pay money, and I by my deed release it, or ac-  
knowledge myself satisfied for the debt; albeit I receive none of it,  
or that I receive but part of it in full satisfaction of the debt; by  
this the obligation is discharged for ever.

If

If the obligee make the obligor, or one of the obligors, or all Bro. Oblig. the obligors, his executor, or his executors; hereby the obligation is discharged for ever. But the granting of letters of administration to one, or more of the obligors, is no discharge of the obligation. And if the obligor make the obligee his executor, this is no discharge of the obligation. 61. Co. 8. 136. 8. Ed. 4. 3. 21 Ed. 4. 2. 11 H. 7. 4.

If the obligee be a woman, and take the obligor to husband, hereby the obligation is discharged. Bro. Oblig. 61.

If the condition be to enfeoff K. S. (a woman) before such a time, and before the day the obligor doth marry the woman; this doth not discharge the obligation. Fitz Barre 133.

If the condition be to serve me seven years, and within the time I licence him to depart, it seems that hereby the obligation is discharged: and yet if the condition be to stand to an award, and it is awarded that one of the parties shall pay 5*l.* a year for seven years towards the education of I. S. and I. S. die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding. Dier 379.

If the condition be to do two things, or stand upon divers points; and the obligee, supposing the breach of one of them, doth sue the obligor, and the issue being joined upon that point it is found against the plaintiff, and he is barred; hereby the whole obligation is discharged; and, so long as that judgment is in force, he can never sue the obligation upon any other point within the condition. Dier 371.

If the condition be to satisfy me for goods I have delivered to I. S. if they be lost, and afterwards they be lost, and I sue I. S. and have him in execution for them; by this the obligation is not discharged: but perhaps when I have satisfaction of I. S. being in execution for the goods, the obligation may be gone. Fitz Barre 64.

And in all cases by which a deed in general may become void by matter *ex post facto*, as by rasure or the like, an obligation may become void.

Co. super  
Lit. 236.  
237. 1. 11  
113.  
Plow. 137  
193. 21 H.  
23. Bro.  
Defeasance  
in toto.

## C H A P. XXII.

## Of a Defeasance.

\* THIS in a large sense doth sometimes signify a condition annexed to an estate; and sometimes the condition of an obligation made with, and annexed to, the obligation at the time of making thereof: but it is more peculiarly and properly applied to such conditional instruments, as are made in defeasance and avoidance of statutes and recognizances, at the time of entering into the same statutes or recognizances; and to such conditional instruments, as are made in defeasance of statutes, obligations, and the like, after the time of the same statutes entered into, and obligations, &c. made: and it is therefore defined as follows.

A defeasance is a condition relating to a deed, as to an obligation, recognizance, statute, or the like, which being performed, by the obligor or recognisor, the act is disabled and made void, as if it had never been done; which differeth from a condition only in this, that this is always made at the same time, and annexed to, or inserted in, the same deed; but that is always made in a deed by itself, and for the most part made after the deed whereunto it hath relation (1).

There is no inheritance executory, as rents, annuities, conditions, warranties, covenants, and such like, but may by a defeasance, made with the mutual consent of all those which were parties to the creation thereof at the same, or at any time after, be annulled, discharged and defeated. And so is the law of statutes, recognizances, obligations, and the like; yet so, as in all these cases regularly, the defeasance must be made *eodem modo* as the thing to be defeated was and is created, *viz.* if the one be by deed, the other must be so also: for it is a rule, that in all cases, where any executory thing is created by a deed, that the same thing, by the consent of all persons who were parties to the creation of it, may be by their deed defeated and annulled; and therefore that warranties, recognizances, rents, charges, annuities, covenants, leases for years, uses at common law, and such like, may, by a defeasance made with mutual consent of all those that were parties to the creation of it by deed, be discharged and avoided. *Nil est tam conveniens naturali æquitati quam quod unumquodque dissolvi potest eo ligamine quo ligatur.* And therefore by such a defeasance, not only the covenant which doth create a power of revocation, but the power itself created, may be utterly defeated and avoided: but estates of inheritance, and other estates in tail or for life, executed by livery, &c. cannot be avoided by defeasance

\* P. 396.  
Defeasance,  
Quid.

2. Where and in what cases a defeasance may be; and what things may be defeated and avoided thereby; and where, and what not.

*An estate executory cannot be defeated by a subsequent instrument as things executed can, but may be made defeasable by an instrument executed at the same time with it.*

(1) A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. 2 Bl. Com. 327.—A defeasance on bond, or recognizance, or judgment recovered, is a condition, which, when performed, defeats or undoes it: it differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. *ibid.* 342.—See further as to the nature of defeasance, and what shall be said to amount to one, in Com. Dig. Defeasance (A.)—Wood's Inst. 293.—Pin. Abr. Defeasance (F).



• P. 397.

*Such deeds of  
defeasance are regarded  
as defeasances only as long  
as they are intended  
to be so.*

made after the time of their creation and first making. And yet by another deed of defeasance made at the time, a feoffment, release, lease for life, or other executed thing, may be avoided, as well as if it were by condition within the same deed: as if a disseisee release to the disseisor, this release cannot be defeated by an indenture of defeasance made afterwards; but it may be defeated by an indenture of defeasance made at the same time. *Quæ in continenti fiunt in esse videntur* (1).

3. What shall be said a good defeasance; and what not. For the manner of it.

To make a defeasance, these things are requisite: 1. That the defeasance be made *eodem modo*, as the thing to be defeated is created: for if the obligee by word only discharge the obligor, or grant not to sue him; this will not defeat the obligation; it must be by deed therefore, as the former was. <sup>a</sup> But whether the deed or defeasance be indented or poll is not material: 2. <sup>b</sup> That if it do recite the statute or the obligation, (as for the most part it doth,) that it be done truly: for if a defeasance be made of a statute or an obligation, which is recited to be made the tenth day of May, 393, whereas in truth it beareth date the first day of May, this defeasance is void. 3. <sup>c</sup> That it be made between the same persons that were parties to the first deed, &c. and therefore, if A. be bound in an obligation to B. in 20*l.* and B. make a defeasance to C. that if C. pay him 20*l.* the obligation made by A. shall be void; this is no good defeasance, because it is not made between the same parties. <sup>d</sup> And yet if a statute be made to the husband and wife, and the husband alone join in the making of a defeasance, this is a good defeasance. 4. <sup>e</sup> That it be made after the making of the recognizance, obligation, &c. and not before: for if A. grant to B. that if B. will be bound to him in 20*l.* by obligation, that the obligation shall be void; and after B. doth bind himself to A. in an obligation of 20*l.* that defeasance is not good because it is before the obligation. <sup>f</sup> And yet if the date of the defeasance be before the date of the recognizance, &c. and it be delivered after, it is good enough. 5. That it be made of a thing defeasible: for if a disseisee release his right to the terre-tenant, and after there is a defeasance made between them, that, if the releasor shall pay 20*l.* to the releasee, the release shall be void; this is a void defeasance. <sup>g</sup> And yet a release may be avoided by a condition or defeasance made at the time of making of a release as well as a feoffment.

For the matter of it.

If the defeasance of a recognizance, obligation, &c. be, that if the cognisor, or obligor, &c. pay a sum of money, or do not disturb the execution of the will of I. S. or do make a lease for years to I. S. or the like; these are good defeasances. As if the grantee of a rent-charge grant to his grantor, that if he shall pay him 20*l.* such a day, the grant of the rent shall be void. Albeit the condition of an obligation, that is repugnant to the obligation itself, is void, and the obligation single; yet it is otherwise in case of a defeasance. <sup>h</sup> And yet a release may be avoided by a condition or defeasance made at the time of making of a release as well as a feoffment.

• P. 398.

made after the obligation; for this is good, notwithstanding it be repugnant. And therefore if the obligee, after the obligation made, grant by deed to the obligor, that the obligation shall be void; or that he will not sue the obligation at all; or that he will not sue the obligation until such a time; or that the obligation

(1) See accordingly, and further in 1 Wood 786.—*Com. Dig.* Defeasance (B.)—*Vin. Abr.* Defeasance (C).

shall

Bro. De-  
4. 7 H. 6.  
21 H. 7.  
Perk. feo-  
69.

Bro. De-  
feasance  
Condition  
120.

Agreed  
Palche. 8.  
& Ja. Co.  
Per just.  
Bridgman.

Bro. De-  
feasance 7.

(1) See f

shall be discharged; these defeasances are good to avoid the obligation.

Bro. Defea. 4. 7 H. 6. 43. If the feoffee with warranty grant, that neither he nor his heirs shall take benefit of the warranty of the feoffor or his heirs; this is a good defeasance of the warranty: and if he grant, not to vouch, this will discharge the voucher: and if he grant, not to bring a *warrantia chartæ*, this will bar him of that remedy. In like manner it is, if the grantee of a rent-charge grant to the grantor, that he will not take any benefit by the grant, this is a total discharge; and if he grant, that he will not bring an annuity, this is a discharge of the person; and if he grant, that he will not distrain the land for the rent, this is a discharge of the land.

Bro. Defea. 11. Condition, 120. If one make a lease for life by deed, and after by another deed doth grant to his lessee, that he shall not be impeached for waste; this is a good discharge: and if the lessee afterwards grant by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make use, nor take advantage of the deed of discharge; this is a good defeasance of the discharge. So that hereby it seems a defeasance may be of a defeasance, and one defeasance after another, and regularly the last shall stand. And therefore, if a lease for years be made on condition to pay 20*l.* at Easter, and the lease to be void, and before Easter the lessor and lessee agree, that, if the lessor pay it at Easter following, the lease shall be void, and before that time they make the like agreement for another year; it seems these be good defeasances, and that the last shall stand.

Agreed Pasche. 8. & Ja. Co. B. Per just. Bridgman. If the defeasance after execution made upon a statute be thus, that, if the conusor pay so much money, the statute shall be void; it seems, by this the statute and execution thereupon is void; howbeit, it is best to add these words in the defeasance] and the execution thereupon.] (1).

And now being coming towards an end, we come to the last assurance of a man's life, or that kind of assurance that men do commonly make when they are near and towards the end of their life, *viz.* a Testament.

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(1) See further in *Vin. Abr.* Defeasance (D).

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## C H A P. XXIII.

## Of a Testament.

\* P. 399. \* **A** Testament is the full and compleat declaration of a man's mind or last will of that he would have to be done after his death: It is in Latin *Testamentum*, i. e. *Testatio mentis*, the witness of a man's mind; and to devise by testament, is to speak by a man's will what his mind is, to have done after his death: and this is sometimes called a will or last will; for these words are *Synonima*, and are as it seems promiscuously used in our law: howsoever, by the civil law it is then only said to be a testament, when there is an executor made and named in it; and when there is none, but a codicil only; for a codicil is the same that a testament is, but that it is without an executor; and a man can make but one testament that shall take effect, but he may make as many codicils as he will. And by the common law where lands or tenements are devised in writing, albeit there be no executor named, yet there it is properly called a last will, and where it doth concern chattles only, a testament (1). He that doth make the testament is called the testator: and when a man dieth without will, he is said to die intestate.

**Codicil, Quid.** Of testaments there be two sorts, namely, a testament in writing, or a written testament; which is, where the mind of the testator in his life-time, by himself or some other by his appointment, is put in writing: and a testament by word, or without writing, which is, where a man is sick, and for fear lest death or want of memory or speech should surprise him, that he should be prevented if he stayed the writing of his testament, desireth his neighbours and friends to bear witness of his last will, and then declareth the same presently by word before them: and this is called a *Nuncupative*, or a *Nuncupatory* testament: and this being after his death proved by witnesses, and put in writing by the ordinary, is of as great force for any other thing but land, as when at the first in the life of the testator it is put in writing. A codicil also is in writing, or by word, as a testament is: the civilians have other divisions of wills and testaments, as solemn and unsolemn, privileged or unprivileged, whereof the common law maketh no mention.

**Testator. Intestate. Quotuplex. Written.**

**Nuncupative.**

(1) See further as to what may be deemed a will or a testament, and the difference between them, in *Swinb.* 6th edit. p. 1.—*Bac. Abr. Tit. Wills and Testaments (A).*—4 *Burn's Eccl. Law.* 41.—3d edit.—With respect to the introduction and progress of wills in *England*, it may not be improper to select a passage from *Wright's* excellent treatise on *Ten.* 173. where it is said, It was altogether as much against the nature of a feud, that the feudatory should dispose of it by *will*, as that he should otherwise alienate upon this ground it was, that though lands were deviseable until the conquest, or rather until the establishment of *tenure*; yet then, or soon after, the power of disposing by *Will* generally vanished, except of *socage* lands and tenements in some *cities* and *burroughs*, where it was retained, or rather indulged, it being of little consequence into what hands such *tenures* fell. And thus far it is true, that *Nulum testamentum apud nos mansit pro lege*, until the statutes 32 and 34 *Hen. 8.* gave a testamentary power over lands, subject only to the restrictions and conditions of those statutes. But though lands were not, as is suggested, deviseable from the time of the conquest until the time of *Henry 8.* yet upon a distinction stated, soon after the statute *Quia emptores terrarum*, between the *land* and the *use* or profits of the land, *feoffments to uses* were invented: by means whereof a man might, before the statute 27 *H. 8. c. 10.* will dispose of the profits, though he could not dispose of the *land* itself.—See more amply as to the antiquity of testaments, and their introduction and progress in *England*.—2 *Bl. Com.* chap. 22. and chap. 33.—*Sull. Lect.* 151. 2d edit.—*God. Orp. Leg.* p. 1.

Term  
the L.  
tit. D.  
Co. B.  
Lit. 1.  
Swinb.  
c. 2.

Dier 3.  
74. Co.  
super L.  
217. Sw.  
132. 13.  
136.

New Term  
of the law  
Co. 8. 13.  
Plow. 288.  
Co. super  
Lit. 209.  
Co. 9. 40.

Dier 4.  
Bro. Exe-  
cutor 155.  
Co. 6. 19.

Co. super  
Lit. 209.  
St. 31 Ed. 3.  
c. 11 Co. 9.  
40. 8. 135.



Terms of  
the Law,  
tit. Devise,  
Co. super  
Lit. 111.  
Swinb. lib. 1.  
c. 7.

The parts of every compleat testament whereof it doth consist, 2. The parts  
are two: 1. The making of devises, or giving of legacies: 2. of it.  
The making and ordination of an executor; for a testament can  
be no more without, than a codicil can be with, an executor.

\* A devise, or legacy, is where a man in his testament doth give \* P 400.  
any thing to another; the first of these terms is properly applied to Devise or  
the gift of lands, and the last to the gift of goods or chattles: legacy.  
and therefore a devise strictly is said to be where a man in his Quid.  
testament doth give his lands to another after his decease; and a  
legacy is said to be where a man in his testament doth give any  
chattel to another to have after the death of the testator; but  
the word is promiscuously applied to the one and to the other. Devisor,  
And he that gives by such a will, is called the devisor, and he to devise, or  
whom the thing is given, the devisee or legatee. legatee.

Dier 317.  
74. Co.  
super Lit.  
217. Swin.  
132. 134.  
136.

And a devise is sometimes simple and without condition: as Quotuplex.  
where I give my land to another and his heirs, or I give 20l. to  
another, without more words. And sometimes it is with a condi-  
tion: which is, when there is a quality added to the devise or le-  
gacy, whereby the effect of it is suspended or hindered, and it is  
thereby made to depend on some future event. And this condi- Conditional  
on, in this case, may be made almost by any words; as if I give devise.  
to one my land, if he pay 20l. to my daughter; or so as he pay  
20l. to my daughter; or paying 20l. to my daughter; or I give one  
20l. if he marry my daughter; or when he shall marry my daugh-  
ter; or I give my wife 20l. a year, whilst she shall live unmar-  
ried; or I give to him, whosoever shall marry my daughter 20l.  
or the like; in all these cases the devise is conditional. The first  
kind of devise is called by the Civilians a simple assignation, and the  
latter a conditional assignation.

New Terms  
of the law.  
Co. 8. 135.  
Plow. 288.  
Co. super  
Lit. 209.  
Co. 9. 40.

An executor in a large sense is taken for any one that is appointed Executor.  
to have the disposition and ordering of the goods and chattles of a Quid.  
man that is dead. And so there are three kinds of executors: the  
first is a *lege constitutus*, who is therefore called *legitimus*; and  
such a one is the ordinary of the diocese, who hath ordinary juris-  
diction in matters ecclesiastical: the second is a *testatore constitutus*,  
who is therefore called *testamentarius*; and he is strictly and properly  
called an executor; and is defined to be one appointed by a man's last Ordinary.  
will and testament to have the disposing and administration of all or  
part of a man's goods and chattles, and to perform a man's last will and  
testament, according to the contents thereof: the third is *ab episcopo*  
*constitutus*, who is therefore said to be *dativus*: and such a one Administrator.  
is an administrator, who is defined to be one that hath the goods  
and chattles of a man dying intestate, committed to his charge  
by the ordinary for want of an executor: and his power, benefit,  
and charge is in all things equal to the power, benefit, and  
charge of an executor.

Dier 4.  
Bro. Exe-  
cutor 155.  
Co. 6. 19.

The executor and administrator also is sometimes universal or Quotuplex.  
total, *i. e.* one that hath the power and disposition of the whole  
personal estate committed to him. And sometimes he is particu-  
lar \* or partial, *i. e.* one that hath the power and disposition of \* P. 401.  
some part of the estate, or of all the estate for a time only, com-  
mitted to him. And sometimes he is absolute, *i. e.* such a one  
that hath an absolute power of the estate, as executor, or admin-  
istrator: and sometimes he is conditional, *i. e.* one that hath a Represent  
limited and conditional power of the estate only. And in both the person  
cases he shall be charged and chargeable for so much as is com- of the testa-  
mitted tor.

Co. super  
Lit. 209.  
St. 31 Ed. 3.  
c. 11 Co. 9.  
40. 8. 135.

mitted to him as the testator or intestate himself: for this cause the executor is said to represent the person of the testator; for as to the estate committed to his trust he may charge others, and be charged himself, sue and be sued, as the testator himself might. And the estate he hath by his executorship is said to be in him to the use of the testator and in his right: and that he doth in the disposition of his estate is said to be in the right and to the use of the testator also. And the administrator hath the same power and property over and in the goods and chattles, the same remedy by suit, and so far forth shall be charged, as the executor; for they differ not in nature, but in name only. And yet the administrator is but the ordinary's deputy; and he may revoke the administration, or call the administrator to an account (1).

3. The nature and effect of a testament, and of a codicil.

A testament is of that nature, that it doth much differ from other acts and deeds, that men do and execute in their life-times: for albeit it be made, sealed, and published in ever so solemn a manner, yet it hath no life nor virtue in it until the testator's death; for it is a maxim in law, *omne testamentum morte consummatum est; et voluntas est ambulatoria usque ad extremum vitæ exitum*: it is therefore resembled until death to the interlocutory sentence, and after death to the definitive sentence, of a Judge. And hence it is said, *Sed legum servanda fides: suprema voluntas, quod mandat, fierique jubet, parere necesse est*. And for this cause a man may alter, or make void his will at his pleasure; and he may make as many new wills and testaments as he will; and there are no means under the sun to bar a man of this liberty. And the latter testament doth always revoke and overthrow the former; but otherwise it is of a codicil (2); <sup>a</sup> for a man may make as many of these as he will; and make no testament at all; <sup>b</sup> or if he make a testament he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the first case they must be all annexed to the letters of administration, and the administrator must perform them; and in the latter case they must be all annexed to the testament, and the executor must take care to perform them. A testament therefore is said to have three degrees. 1. An inception, which is the making of it. 2. A progression, which is the publication of it. 3. A consummation, which is the death of the testator. In grants therefore, the first is of greatest force, but \* in testaments the last is of greatest force. But when a testament is perfected by the death of the party, it doth as effectually give and transfer estates, and alter the property of lands and goods, as acts executed by deeds in the life-time of the parties: for hereby descents of lands are prevented; and a man may make estates in fee-simple, fee-tail, for life, or years, of lands, tenements, rents, reversions or services, as effectually by testament, as by deed; and

(1) See more amply as to the different kinds of executors in *Swinb.* 379.—6th edit.—and in *Godf. Orp. Leg.* 75.—

(2) Which is either for the explanation or alteration of something in, or for addition of something to, or for subtraction of something from, the testament: and a codicil hath this further use and force in law, that wherever it is added to a testament, wherein the testator declares that he will have the disposal of his estate to be in force, either by way of a testament, or codicil, or whatever other way the law allows: in that case, if the testament to which such codicil is annexed, afterwards proves to be invalid as a testament, that is, as to the appointing or constituting of an executor, yet it shall stand good as a codicil; and be observed as such by him who administers to the same. *Godf. Orp. Leg.* 4.

Perk. fec.  
505.  
Dier 221

Co. 6. 23

Stat. 32.  
34 H. 8.  
Co. 4. 51.  
Bro. Test.  
ment 13.  
12 H. 7.  
Perk. fec.  
502. Fitz.  
Execut. 4

Plow. 526.  
Fitz. Exec.  
utor 109.

12 H. 7. 2.  
18 Ed. 4. 1.  
Perk. fec.  
501. Fitz.  
Executor  
5. 28. 109.  
Bro. Testa-  
ment 11.

(1) See  
(2) A w  
other respo  
(3) But  
such goods  
shall accrue  
the can ma  
(4) In th  
band had in  
the husband  
(5) If a  
money, or  
band; and  
her husband

these estates also will be good without any livery of seisin or attornment. And hereby also rents, and power to distrain for them, may be transferred: conditions created and annexed to estates, or to things devised. And therefore they that take by devises of lands, are said to take in the nature of purchasers. And if therefore a tenant in tail make a feoffment to the use of himself in fee, and after devise the same land to his wife in fee, and die; the son is not remitted, though the father die seised: for the devise doth prevent the descent (1).

Co. 6. 23. To the making of every good testament, these things are requisite.

1. That the testator be a person able to make a testament, and not disabled for any special cause, either in respect of his person, mind, or condition, or in respect of the thing whereof the testament is to be made. And for this it must be known: that a woman that hath a husband cannot make a testament of her lands or goods, except it be in some special cases (2): for of her lands she can make no testament, either with or without her husband's consent: of the goods and chattels she hath as executrix, to any other, she may make an executor without her husband's consent; for if she do not so, the administration of them must be granted to the next of kin to the deceased testator, and shall not go to the husband: but of them she can make no devise, either with or without her husband's leave, for they are not devisable; and if she do devise them, the devise is void (3). And of the things due to the wife, whereof she was not possessed during the marriage, as things in action (4), and the like, it seems she may make her testament; at least she may make her husband executor of her paraphernalia, viz. her necessary wearing apparel, being that which is fit for one of her rank: some say she may make a testament without her husband's leave; others doubt of this; howbeit all agree, that she and not his executor, shall have this after her husband's death, and that the husband cannot give it away from her (5). And of the goods and chattels her husband hath, either by her or otherwise, she may not make a testament, without the license and consent of her husband first had so to do. But with his leave and consent she may make a testament of his goods, and make him her executor if she will. And it is said also, that if she do make a testament of his goods, (in truth, without his leave and consent,) and he after her death \* suffer the will to be proved, and deliver the goods accordingly; in this case the testament is good. And yet if the husband give his wife leave to make a testament of his

4. What shall be said a good and a sufficient testament, or not.

First, in respect of the person that doth make it, and the thing whereof it is made: and what persons may make a testament; and of what things; or not; and how.

A feme covert.

Bac. 7. 373

A feme sole will who marries, survives by the prior death of her husband. *Smith's case* *2 B. & C. 100* *109* *110* *111* *112* *113* *114* *115* *116* *117* *118* *119* *120* *121* *122* *123* *124* *125* *126* *127* *128* *129* *130* *131* *132* *133* *134* *135* *136* *137* *138* *139* *140* *141* *142* *143* *144* *145* *146* *147* *148* *149* *150* *151* *152* *153* *154* *155* *156* *157* *158* *159* *160* *161* *162* *163* *164* *165* *166* *167* *168* *169* *170* *171* *172* *173* *174* *175* *176* *177* *178* *179* *180* *181* *182* *183* *184* *185* *186* *187* *188* *189* *190* *191* *192* *193* *194* *195* *196* *197* *198* *199* *200* *201* *202* *203* *204* *205* *206* *207* *208* *209* *210* *211* *212* *213* *214* *215* *216* *217* *218* *219* *220* *221* *222* *223* *224* *225* *226* *227* *228* *229* *230* *231* *232* *233* *234* *235* *236* *237* *238* *239* *240* *241* *242* *243* *244* *245* *246* *247* *248* *249* *250* *251* *252* *253* *254* *255* *256* *257* *258* *259* *260* *261* *262* *263* *264* *265* *266* *267* *268* *269* *270* *271* *272* *273* *274* *275* *276* *277* *278* *279* *280* *281* *282* *283* *284* *285* *286* *287* *288* *289* *290* *291* *292* *293* *294* *295* *296* *297* *298* *299* *300* *301* *302* *303* *304* *305* *306* *307* *308* *309* *310* *311* *312* *313* *314* *315* *316* *317* *318* *319* *320* *321* *322* *323* *324* *325* *326* *327* *328* *329* *330* *331* *332* *333* *334* *335* *336* *337* *338* *339* *340* *341* *342* *343* *344* *345* *346* *347* *348* *349* *350* *351* *352* *353* *354* *355* *356* *357* *358* *359* *360* *361* *362* *363* *364* *365* *366* *367* *368* *369* *370* *371* *372* *373* *374* *375* *376* *377* *378* *379* *380* *381* *382* *383* *384* *385* *386* *387* *388* *389* *390* *391* *392* *393* *394* *395* *396* *397* *398* *399* *400* *401* *402* *403* *404* *405* *406* *407* *408* *409* *410* *411* *412* *413* *414* *415* *416* *417* *418* *419* *420* *421* *422* *423* 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(1) See further as to the nature and effect of a will and codicil, in *Bac. Abr. Wills. (E.)—Swinn. 51.*  
 (2) A wife, whose husband is banished by act of parliament for life, may make a will, and act in every other respect as a feme sole, 2 *Verk. 104.* *Countess of Portland v. Prodders. Bac. Abr. Wills. (E.)—Swinn. 51.*  
 (3) But although the wife, being executrix, may without her husband's license make her testament of such goods whereof she is possessed as executrix, yet the profits arising therefrom during the marriage shall accrue to her husband, and not unto herself as executrix; so that without her husband's approbation she can make no testament of such profits.—*God. Orp. Leg. p. 31.*  
 (4) In the case of *Adams v. Cole.—Ca. Temp. Talb. 168.* *Ld. Talbot* decreed a bond which the husband had in right of his wife, but whereon he had never recovered, to go to the husband's representative; the husband being a purchaser of his wife's fortune by the settlement he had made upon her.  
 (5) If a woman saves money out of her pin-money or separate maintenance, she may dispose of such money, or of any jewels, &c. bought with it, by writing in nature of a will, if she dies before her husband; and shall have it herself if she survives him; and such money, jewels, &c. shall not be liable to her husband's debts. See *Herbert v. Herbert, Prec. in Chan. 44.*



goods, and she do so, he may revoke the same at any time in her life-time, or after her death before the will be proved. But a woman, after contract with any man, may before the marriage make a testament as well as any other, and is not at all disabled hereby (1).

An infant, until he be of the age of ore-and-twenty years, can make no testament of his lands by statutes of 32 & 34 H. 8. But by special custom in some places, where land is devisable by custom, he may devise it sooner. And of his goods and chattels, if he be a boy, he may make a testament at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before; and then they may do it without and against the consent of their tutor, father, or guardian. And yet some say an infant cannot make a testament of his goods and chattels until he be eighteen years of age (2). A mad or lunatic person, during the time of his insanity of mind, cannot make a testament of lands or goods; but such a one as hath his *lucida intervalla*, clear or calm intermissions, may during the time of such quietness and freedom of mind make his testament, and it will be good. So also an idiot, *i. e.* such a one as cannot number twenty, or tell what age he is, or the like, cannot make a testament, or dispose of his lands or goods; and albeit he do make a wise, reasonable, and sensible testament, yet is the testament void. But such a one as is of a mean understanding only, that hath *grossum caput*, and is of the middle sort between a wise man and a fool, is not prohibited to make a testament. So also an old man, that by reason of his great age is childish again, or so forgetful, that he doth forget his own name, cannot make a testament; for a testament made by such a one is void. So also it seems a drunken man, that is so excessively drunk, that he is deprived of the use of reason and understanding during that time, may not make a testament; for it is requisite, when the testator doth make his will, that he be of sound and perfect memory, *a i. e.* that he have a reasonable memory and understanding to dispose of his estate with reason. <sup>b</sup> A man that is both deaf and dumb, and that is so by nature, cannot make a testament. But a man that is so by accident, may by writing or signs make a testament. And so may a man that is deaf or dumb by nature or accident. And so also may a man that is blind. An alien born cannot make a testament of lands or goods. <sup>c</sup> A man that is entred into religion, cannot make a testament. <sup>d</sup> A traitor attainted, from the time of the treason committed, can make no testament of his lands or goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence, <sup>e</sup> he may take a testament of his lands or goods as another man. A man that is attainted or convict of felony cannot make a testament of his lands or goods, for they are forfeit; but if a man be only indicted, and die before attainder, his testament is good for his lands and goods both. And if he be indicted, and will not answer upon his arraignment, but standeth mute, &c. in this case, his lands

A lunatic person.

An idiot.

An old man.

A deaf and dumb man.

An alien.

A traitor.

\* P. 404.

A felon.

(1) See accordingly, and further as to a testament made by a feme-covert, of what things it may be made, and in what cases it shall operate, in *Swinb.* 88.—1 *Wood* 790.—*God. Orp. Leg.* 29.—*Com. Dig. Devise* (H. 3.)—4 *Burn's Ecc. Law.* 45.

(2) See fully with respect to the earliest age at which a will may be made of personal estate, in note 6 to *Co. Lit.* 89. b. 13th edit. where the various authorities, relating to that disputed point of doctrine, are collected and judiciously considered—and further in *Com. Dig. Devise* (H. 2.)

*In M. L. case  
Burn's Ecc. Law.  
Folios 120 p. 14  
2 T.R. 658  
7 Bac. Ab. 264*

Sta. 32 Ed.

34 H. 8.

c. 5.

Perk. fecd.

503, 504.

Br. Custom

50. Swin.

37, 38.

Co. super

Lit. 89.

Perk. fecd.

503, 504.

24.

Swin. 37.

40.

Swinb. 39.

40.

Swinb. 41.

a Co. 6. 13.

Hil. 3 Car.

per the l.d.

Keeper in

Chancery.

b Swin. 53.

c Curia B. R.

7 Jac.

d Sta. 5 & 6

Ed. 6. c. 11.

Swinb. 54.

Prerogat.

Reg. Plow.

258, 259.

Swinb. 28

281, 285,

286.

(1) By St

not answer

ment and e

by verdict o

such person

thereupon a

(2) And

Wills (B.)—

are not forfeit, and therefore it seems he may make a testament of them (1). And if a man kill himself, his testament, as to his *A felo de se.* goods and chattels is void, but as to his lands is good.

Plow. 261.

Fitz. Dec.

16.

Fitz. Test. 1.

A man that is outlawed in a personal action cannot make a testa- An outlaw-  
ment of his goods and chattels so long as the outlawry doth con- ed person.

tinue in force; but of his lands he may make a testament. The A corpora-  
head or any of the members of a corporation may not make a tes- tion.

tament of the lands or goods they have in common; for they shall A villain.  
go in succession. A villain cannot make a testament of his lands

or goods, after the Lord hath seized them. But here note, that howsoever the testaments of traitors, aliens, felons, outlawed persons, and villains be void, as to the King, or Lord that hath right to the lands or goods by forfeiture or otherwise, yet it seems the testament is good against the testator himself, and all others but

Swinb. 155.

See the

Stat. 31 &

34 H. 8.

Perk. sect.

496.

such persons only. And here note further also, by the civil law

also the testament of divers others, as excommunicate persons,

hereticks, usurers, incestuous persons, sodomites, libellers, and the

like, are void. But, by our law, the testaments of such persons,

at least as to their lands, are good by the statutes that do enable

men to devise their lands. But all other persons whatsoever, male

or female, old or young, lay or spiritual, rich or poor, at any time

before their death, whilst they are able to speak so distinctly, or

write so plainly, as another may understand them, and understand

that they understand themselves, may make testaments of their

lands, goods, and chattels; and that, albeit they have sworn to

the contrary: and none are restrained of this liberty, but such as

are before named. See more *infra* to this matter (2).

See more

*infra* at

Num. 7.

Swin. 9.

131. 324.

125.

The second thing, required to the making of a good testament, Secondly,  
is, that he that doth make it have, at the time of the making of in respect of  
it, *animus testandi*, i. e. a mind to dispose, a firm resolution and the mind of  
advised determination to make a testament; otherwise the testament him that  
will be void: for it is the mind, not the words, of the testator, it. doth make

that doth give life to the testament: for if a man rashly, unad-

visedly, incidently, jestingly, or boastingly, and not seriously, write

or say that such a one shall be his executor, or have all his goods,

or that he will give to such a one such a thing; this is no testa-

ment, nor to be regarded. And the mind of the testator herein is

to be discovered by circumstances: for if at the time he be sick,

or set himself seriously to make his testament, or require witnesses

to bear \* witness of it, it shall be deemed in earnest; but if it be

by way of discourse only, or of somewhat he will do hereafter,

or the like, it shall be taken for nothing. P. 405.

Swinb. 283.

284. 285.

286.

The third thing, required in a good testament, is, that the Thirdly, in  
mind of the testator, in the making of it, be free, and not moved respect of  
by fear, fraud, or flattery: for when a testator is moved to make the occasion  
his testament by fear, or circumvented by fraud, or overcome by or motive  
some immoderate flattery; the same is void, or at least voidable of it.  
by exception. And therefore if a man by occasion of some present

(1) By statute 12 Geo. 3. c. 20. every person arraigned for felony or piracy, who shall stand mute, or not answer directly to the offence, shall be convicted thereof, and the court shall thereupon award judgment and execution against the person so standing mute, in the same manner as if he had been convicted by verdict or confession; and such judgment shall have all the same consequences in every respect as if such person had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

(2) And further, as to what persons are capable of making testaments, see 1 Bl. Com. 497.—Bac. Abr. Wills (B).—Vin. Abr. Devise (A)

fear, or violence, or threatening of future evils, do at the same time, or afterwards by the same motive, make a testament; this testament is void, not only as to him that put him so in fear, but as to all others, albeit the testator confirm it with an oath. But if the cause of fear be some vain matter, or being weighty is removed, and the testator doth afterwards, when the fear is past, confirm the testament; in this case, perhaps the testament may be good. And if a man by occasion of some fraud or deceit be moved to make a testament, if the deceit be such as may move a prudent man or woman, and if it be evil also, the testament is void or voidable at the least; but if the deceit be light and small, or if it be to a good end, as where a man is about to give all his estate to some lewd person from his wife and children, and they perswade the testator that the lewd fellow is dead, or the like, and thereby procure him to give his estate to them; this is a good testament. And one may by honest intercessions, and modest perswasions, procure another to make himself, or a stranger, executor to him, or the like, and this will not hurt the testament. Also a man may use fair and flattering speeches to move the testator to make his testament, and to give his estate unto himself or some friend of his; except it be in case where the flatterer doth first beat or threaten him; or put him in fear, or to his flattery joineth fraud and deceit, or the testator is a person of weak judgment, or under the danger of government of the flatterer, as when the physician shall perswade his patient under his hands to make his testament, and give his estate to himself; or the wife attending on her husband in his sickness shall neglect him, or continually provoke him to give her all; or where the perswader is importunate and will have no denial; or when there is another testament made before; for in all these cases, the testament will be in danger to be avoided. And if I be much privy to another man's mind, and he tell me often in his health how he doth intend to settle his estate, and he being sick, I do of mine own head draw a will according to his mind before declared to me, and bring it to him, and ask him whether this shall be his will or no, and he doth consider of it, and then deliver it back to me, and say, yea; this is a good testament: but if otherwise some friends of a sick man of their own heads shall make a will, \* and bring it to a man in extremity of sickness, and read it to him, and ask him whether this shall be his will, and he say yea, yea; or if a man be in great extremity, and his friends press him much, and so wrest words from him, especially if it be in advantage of them, or some friends of theirs; in these cases, the testaments are very suspicious.

But as touching these two last things, *Quare* how they shall avail in the wills of land, which are not regulated so much by the civil law (1).

Fourthly, in respect of the manner and form of the disposition. 1. Naming of an executor. The fourth thing, required in the making of a good testament, is, that the form and order, that the law prescribeth, be observed in the disposition: and therefore, 1. that there be an executor named in all testaments of goods and chattels, and that that executor named be capable of the executorship; for this is said to

(1) A will of lands, made by the permission and under the control of the statutes respecting wills, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject.—see 2 *Bl. Com.* 378.



be the head and foundation of the testament : for if there be never so many legacies given, and no executor made, this disposition is but a codicil, and cannot properly be called a testament : for in this case, the party dead is said to die intestate, and the administration of his goods must be granted to the widow, or next of kin ; whereas, on the other side, if an executor be appointed, albeit there be no legacy given, yet this disposition is, and is properly said to be, a testament. 2. If the testament be of lands or tenements, it must be in writing, and it must be committed to writing at the time of the making thereof (1) : and it is not sufficient that it be put in writing after the death of the testator, being first made by word of mouth only, for then it is but *nuncupative* still. But if the testament be first made by word of mouth, and be afterwards written, and then brought to the testator, and he approve it for his testament ; or if the testator, when he doth declare his mind, doth appoint that the same shall be written, and thereupon the same is written accordingly in the life-time of the testator ; these are good testaments of land, and as good as if they were written at the first. If therefore one be very sick, and another come to him, and ask him whether his wife shall have his land, and he say yea, and a clerk being present doth put this in writing, without any precedent commandment or subsequent allowance of the sick man : this is no good testament of the land. So if one declare his whole mind before witnesses, and send for a Notary to write it, and die before he come, and he write it after his death ; this is no good testament for his lands, but a good *nuncupative* will for his goods and chattels, except he declare his mind to be, that it shall not be his will unless it be put in writing, for then perhaps it may not be a good will for his goods and chattels. So if he that doth write the will cannot hear the party speak, and another that stands by the sick man doth tell him what he doth say ; in this case, if there be none others present \* to prove that he reported the very words of the sick man, this will be no good testament of the land. But if a Notary take direction from the sick man for his will, and after go away and write it, and then doth bring it again and read it to the testator, and he approve it ; or if it be written from his mouth by the Notary according to his mind, and his mind were to have it written, albeit it be not shewed or read to him afterwards ; these are good testaments. So if the Notary do only take certain rude notes or directions from the sick man which he doth agree unto, and they be afterwards written fair in his life-time, and not shewed to him again, or not written fair until after his death, these are good testaments of lands. If a sick man bid the Notary make a testament of his lands, but doth not tell him how, and the Notary make a devise of it after his own mind, this is no good testament : and yet if it be after read unto,

2. If it be of lands, it must be in writing.

*Case, & shew Dr. B. This will be under hand of a sick man, who for his land, only he will not write it. But you shall see a will unattested will be so copyholder and a witness to the use of the will is not necessary. It is a question whether such a will passed in copyholder.*

\* P. 407.

Stat. 32 & 34. 8.  
Perk. sect.  
476, 477.  
Dier 72.  
Flow. 345.  
Co. 4. 60.  
Dier 53.

Adjudged  
T. 10. 12.

(1) By the 5th sect. of the statute 29 Car. 2. c. 3. it is enacted that all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.—See 3 Lew. 86.—Carthew 35. 514.—3 Mod. 218. 262.—But if it be a testament of chattels only, and be written in the testator's own hand, although it has neither his name nor seal to it, nor any witnesses present at its publication, yet it is a good will, if there is sufficient proof of its being his hand writing.—2 Bl. Com. 501.—Gill. Rep. 260.—God. Orp. Leg. 66.

and

and approved by the testator, it may be good (1). And so if a testament be found written in the testator's house, and not known by whom, and it be read unto and approved by the testator, this is not a good testament in writing for lands and goods. 3. Uses of lands, before the statute of uses, might, and lands and tenements devisable by custom, and goods and chattels may be disposed by word without writing, and such testaments of such things so made are good (2). 4. It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand or letters, whether in Secretary hand, Roman hand, or Court hand, or in any other hand, a testament be written, so it be fair and legible that it may be read and understood: neither is it material whether the same be written at large, or by notes, or characters usual or unusual, as xx<sup>s</sup> for twenty shillings, or when the figure [2] is used instead of the letter A. if it be usual in the testator's writing, or the like, for the testament is good notwithstanding. So also if some words be omitted, or sentences improper used, when the intent and meaning is apparent, as where a man saith, [I make my wife of this my last will and testament] leaving out the word [executrix] yet the testament is good, and this shall be understood: but if it be so done as it cannot be read, or by reading the mind of the testator cannot be known, then is the testament void and of no force. In the like manner as a *nuncupative* will is, when the words spoken are so ambiguous, obscure and uncertain, that thereby the meaning of the testator cannot be known nor understood. 5. Where writing is needful, (as in the case of disposition of land it is,) there sealing of the testament, or subscribing of the testator's name, is not necessary (3). And therefore if a man by himself, or another, do make a testament of his land, and do not put his seal or name to it, if he agree to it, this is a sufficient testament. \* 6. If whilst the testator is making his will, and whilst he intendeth to proceed further at that time, either by adding, diminishing, or altering, he be suddenly stricken with sickness, or insanity of mind, whereby he cannot proceed, but gives it over in the midst and so he die; it seems, in this case, the whole will is void. And yet if a man begin his will, and make perfect devises to one, and then of himself he give over until another time; or if a man make a perfect devise to one, and then die before he can make any devise to any others; it seems these are good testaments for as much as is done. And therefore it is said, if one command another to make

3. Uses and lands by custom, and chattels devisable without writing.

4. The matter or hand wherein and whereby it is written.

5. Sealing and subscribing the testator's name not needful.

\* P. 408. Sixthly, interruption in the making of the will.

Swinb. part 4. sect. 25.

Swin. 18

Swin. part 7. sect. 13 par. 4. sect. 25.

Perk. sect. 475, 477.

Swinb. 6. Lit. Bro. sect. 300. Swinb. part 7. sect. 10. Co. 3. 31.

(1) By the 19 & 20 *sect.* of the statute of 29 *Car. 2. c. 3.* it is enacted that no *nuncupative* will shall be good, where the estate thereby bequeathed shall exceed the value of 30*l.* that is not proved by the oaths of three witnesses at the least that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; nor unless such *nuncupative* will were made in the time of the last sickness of the deceased, and in his or her habitation, or where he or she hath been resident for ten days or more next before the making of such will, except where such person was taken sick, being from home, and died before he or she returned home.—And that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will *nuncupative*, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.—See more amply in what cases a *nuncupative* will shall be good, and as to the time and manner of making and proving it,—in *God. Orp. Leg. 13.*—2 *Bl. Com. 501.*—*Com. Dig. Devise (C.)*—*Bac. Abr. Wills (D. 2.)*—*Vin. Abr. Devise (Y. e.)*

(2) See the note before, as to the 5 *sect.* of the statute 29 *Car. 2. c. 3.*

(3) But it is now under the statute 29 *Car. 2.* as hath been observed before.—Sealing a will is not a sufficient signing within the statute of frauds and perjuries, per *Parker C. B.* and *Barons Clive & Smyth*, in *Smith v. Evans*, 1 *Wils. pt. 1. p. 313.* contrary to the opinion of *North, Windham, and Charlton*, in *Lenayne v. Stanley*, 3 *Lev. 1.* as *1751. 1. 1751. 1. 1751. 1.*

his

(1) See the  
B  
owed to be  
good witness  
(2) See no

his will, and by it to devise *White Acre* to *I. S.* and his heirs, and *Black Acre* to *I. N.* and his heirs, and he write the devise to *I. S.* and his heirs, and the testator die before he can write the devise to *I. N.* and his heirs; this is a good devise to *I. S.* but a void devise to *I. N.* and his heirs. But if a man bid the Notary write a devise of his land to *I. S.* upon condition, and the Notary write a devise to *I. S.* but the testator dieth before he can write the condition; in this case the whole Devise is void. But a

Swin. 188.

man may if he please make a testament of part of his goods, and die intestate for the rest, and that disposition he doth make is good for so much. 7. The last thing required to the perfection

Swin. part.  
7. sect. 13.  
par. 4. sect.  
15.

of a testament, is, that it be proved; for if it be never so well made, and be in truth the testament of the testator, yet if it cannot be by proof made to appear so, it is but a void testament, and of no force at all. And therefore herein these things are to be known: 1. That a *Nuncupative* testament must be proved by two witnesses at the least, and those must be such as are without exception (1). 2. A written testament, when it is written with the testator's own hand, doth prove and approve itself, and therefore need not the help of witnesses to prove it (2). And for this cause if a man's testament be found written fair and perfect with his own hand after his death, albeit it be not subscribed with his name, sealed with his seal, or have any witnesses to it, if it be known or can be proved to be his hand, it is held to be a good testament, and a sufficient proof of itself; but if it be sealed with his seal, and subscribed with the name of the testator, and can be proved by witnesses, it is the more authentic. And when it is found amongst the choice evidences of the testator, or fast locked up in a safe place, it is the more esteemed: but if it be written in another hand, and the testator's hand and seal, or one of them not to it, albeit it be found in such a place as before, yet some proof will be expected of it further by witnesses in that case. And if a writing be found under the testator's own hand, yet if it be but a scribbling writing written copy-wise, with a great distance between every line, without any date, in strange characters, with many interlinings, and lying amongst his void papers, or the like; this will not be \* esteemed a sufficient testament, nor a good \* P. 409. proof of it; but it shall be accounted rather a draught or image of the testator's will for a direction to him after to make his will by: and yet if it can be proved that the testator did declare himself that this should be his will; this will be a good testament, and a good proof of it. 3. If it be proved the testator said his testament was in such a schedule in the hands of *I. S.* and *I. S.* produce a writing deposing it to be the same, it seems this is a sufficient proof; but if he say withall it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected. 4. If the witnesses will prove the writing produced to be the last will of the testator, or that he said, it was, or it should be his last will, or that it is the same writing that was shewed unto them, and whereunto they are witnesses, albeit they never heard

Seventhly,  
in respect of  
the proof of  
it; and what  
shall be said  
a sufficient  
proof of a  
testament,  
or not.

(1) See the note before as to the 19 & 20 *sect.* of the statute of Frauds:—see also the 21<sup>st</sup> *sect.* of that Act. —By stat. 4 *Ann. c.* 16 *f.* 14. it is declared that all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto.

(2) See note 1 to page 391.



Witness  
competent  
to prove a  
testament.

*As to the necessity  
of the witnesses  
being in the testator's  
presence together see  
Gough v. Gough 2 Atk. 176.  
This is not necessary  
if the testator dies the  
witnesses at that time  
a will done it is  
sufficient.  
Coffin v. Deane 1 Bro. 285*

it read, or set their hands to it, it is a sufficient proof. 5. All Swinb part persons male and female, rich and poor, are esteemed competent witnesses to prove a will; save only such as are infamous, as perjured persons, and the like; and such as want understanding and judgment, as children, infants, and the like; and such as are presumed to bear affection, as kindred, tenants, servants and the like.

A legatee is reputed a competent witness to prove any other part of the will, but his own legacy, or to prove any thing against himself touching his own legacy, but not otherwise. And therefore where there be two witnesses of a will, wherein each of them hath somewhat bequeathed unto himself; this will cannot be sufficiently proved for those legacies; but for the rest of the will it may be sufficiently proved (1). 6. Where there is no question nor opposition moved or had about or against a testament, there the oath of the executor alone is esteemed a sufficient proof of it; and in that case regularly no other proof is required; and where more proof is necessary, as in the cases before, it is in the discretion of the ordinary, what proof to admit and allow; and those witnesses for number, nature, and quality; or that other proof, that he doth deem and accept for sufficient, is sufficient; and the testament so proved by such witnesses, or other proof, is sufficiently proved (2). And of this question see more *infra*, at numb. 7.

5. Where,  
and how a  
testament  
good in its  
beginning  
may become  
void by mat-  
ter *ex post  
facto*, or not.  
1. By coun-  
termand or  
revocation.  
\* P. 410.

A testament, sufficient and good in it's creation and beginning, may afterwards become void by divers means, as first by countermand or revocation; and this is sometimes by the party himself that made it, and sometimes it is by another; and sometimes it is expressed, and sometimes it is implied; for it is a rule, that any act or thing done, or words spoken, by the testator after the testament made, or that doth alter or cross all or part of his testament made before, is a revocation of it, or of that part thereof that is so crossed and altered. And therefore if a feme sole make a testament, \* and after take a husband; by this the testament is revoked. And if a man make a testament of land, and after make a feoffment of the same land, which feoffment is not good for some defect in the livery of seisin, or otherwise, so that the feoffor dieth seised of the land notwithstanding; hereby the testament as to this land is revoked (3). So if a man make a latter testament, and therein by express words doth revoke the former testament; or if a man by any writing, or by word of mouth, (for one may by word of mouth revoke a will in writing, albeit

(1) See the Stat. 25 Geo. 2. c. 6. "for putting an end to doubts and questions relating to the attestation of wills and codicils concerning real estates."—It enacts, that beneficial devises, legacies, estates, &c. given to any person who shall attest the execution of a will or codicil after the 24th of June 1724, shall be void, and such person shall not be admitted a witness to the execution of such will or codicil.—That where lands are charged by will or codicil with debts, any creditor whose debt is so charged, who shall attest the execution, shall be a good witness.—That a legatee who attested the execution, and who has been paid, or has accepted or released, or has refused to accept his legacy, upon tender thereof; such legatee shall be a witness.—See fully as to the occasion and operation of this stat. in 2 Bl. Com. 377.—*Windham v. Chetwynd*, 1 Burr. 414.

(2) A will shall not be read on proof of a witness's hand unless there be positive proof that he is dead, *Bishop v. Burton*, Com. Rep. 614.—and in *Townsend v. Ives*, 1 Will. Rep. 216. it is said to be a rule, that all the witnesses, if living, must be examined to prove the will.—See more amply as to what shall be a sufficient proof of a will, in *Bac. Abr. Wills* (D. 3.)—*Eq. Ca. Abr. Wills* (A.)—*Vin. Abr. Devise* (N. 13).

(3) An alteration of circumstances may be a revocation of a will of lands as well as of a personal estate, and that, notwithstanding the statute of Frauds and Perjuries, which does not extend to an implied revocation, per Lord Keeper, in *Brown v. Thompson*, 1 Eq. Ca. Abr. 413.—The numerous cases respecting implied revocations will be found, interspersed amongst the cases respecting express revocations, in the books referred to in a subsequent note. *Shannon v. Tindal*, 10 B. & C. 26. 27.

*As to proof of witnesses writing + B. & C. 697. Adams v. Carr 1 B. & C. 360. Campbell v. Weston 11 B. & C. 183. Cruise v. Blackburne 2 East 250. Corby v. Perry 1 Taunt 366. Ward v. Williams 1 Parkin v. Hoskins 2 Taunt. 220. Jones v. Brown 4 Taunt. 46. Nelson v. Whitell 1 B. & C. 220.*

(1) Bu  
thereof,  
claring th  
in his pre  
or codicil  
witnesses  
1 Pr. W  
tates, sha  
only, ex  
him, and

Dier 310. it be of land) (1); do expressly revoke a former testament that he  
 34. Eliz. B. hath made, and make no new testament, (for so a man may do,  
 R. Burton's and die intestate if he will; or if a man make a latter testament,  
 case. and make no mention of the former testament; all these are coun-  
 termands of the former testament. And the latter testament doth  
 always revoke the former; and that, albeit the executor of the  
 latter do refuse the executorship, or die during the life of the  
 testator, or after his death; and albeit the King be made executor  
 of the former; and albeit the former be a written, and the latter  
 but a *nuncupative* testament: and this holdeth true in a testament  
 of lands, as well as in a testament of goods and chattels; but  
 otherwise it is *è converso*; for however a man may by word avoid  
 a will made in writing that is good, yet a man cannot by word  
 make good and affirm a will made in writing that is void. And  
 therefore if a man devise his land in writing to I. S. and his  
 heirs, and I. S. die before the deviser, and after the deviser say  
 by word, that the heirs of I. S. shall have the land, as I. S.  
 should have had it if he had lived, this verbal declaration will not  
 affirm the disposition. Also the latter testament doth infringe the  
 former, albeit there be no mention made in the latter of revoking  
 the former; and albeit there be twenty witnesses of the former,  
 and but two or none of the latter; and albeit in the former the  
 executor be appointed simply and without condition, and in the lat-  
 ter he be appointed conditionally, and the same condition be also  
 broken, so that the condition be of something then to come, at  
 the time when the condition was made; but if the executor of the  
 latter testament be made upon some condition then present or  
 past, the condition not existing, the former testament is not revoked;  
 and albeit the former testament be made irrevocable, *i. e.*  
 that the testator say, I make this my last will and testament ir-  
 revocable; and albeit the testator had sworn not to revoke the for-  
 mer, the oath being also revoked together with the testament;  
 and albeit the testator enter into an obligation with condition not  
 to revoke it; but then in this case he doth forfeit his obligation.  
 But the latter testament doth not revoke the former in these cases  
 following: 1. When the latter is imperfect in respect of will; *i. e.*  
 when the testator dieth whilst he is making of \* it, and before he  
 can finish it; or when it is vehemently suspected that the testator  
 was compelled to make the latter by fear or violence; or induced  
 to make it by fraud and deceit; or when the former was made by  
 the testator whilst he was in his good and perfect mind and memo-  
 ry, and the latter is made by him when he is *inops mentis*; or when  
 the latter is made by the persuasion and for the benefit of certain  
 persons, when the testator is in extremity or sickness; unless it ap-  
 pear plainly to be the express will of the testator to revoke the  
 former; or unless the testator himself did dictate the latter; or in  
 case the latter be in favour of the children of the testator or others,

*See also: Jany  
 finding and the  
 will the  
 Henneford v. Henneford  
 10 Mod. 376.  
 11 Mod. 146  
 as a second will  
 showing a difference  
 Goodright v. Henneford  
 5 Will. 147. 157. 158.  
 If there are two  
 in contrary wills  
 and priority cannot  
 be proved, both  
 are void  
 Phillips v. Angleson  
 7 Bro. P.C. 448  
 11 Mod. 101  
 Wright v. Warren  
 5 Th. 514.*

Condition.

\* P. 411.

(1) But now by the 6th *stat.* of the 29 *Car. 2. c. 3.* no devise in writing of lands, &c. or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent, but shall continue, &c. unless altered by some other will or codicil in writing, or other writing of the devior, signed in the presence of three or more credible witnesses declaring the same—See the cases of *Egghston v. Speke*, 3 *Mod.* 258.—and *Onions v. Tyrer*, 1 *Pr. Wms.* 343.—And by the 22d *stat.* of the same stat. no will in writing, concerning personal estates, shall be repealed, nor any clause or bequest therein altered by words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and read to and allowed by him, and proved to be done by three witnesses.

who

who are to have the administration of his goods if he die intestate. 2. When the testator doth make two testaments, a former and a latter, both being written, and afterwards lying sick upon his death-bed, they are both presented unto him, and he is desired to deliver, to one of the standers by, which of them he will have to stand for his last will, and he delivered the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter testament there is no executor named; for then it is but a codicil or addition to the former. 5. When the latter is made upon some sudden discontent against the executor of the former testament, and afterwards he and the executor are reconciled again: in these, and such like cases, the latter testament is no revocation of the former. If the husband licence the wife to make a testament, and after her death he forbid the probate, this is a countermand of the testament. But note here, that revocations in general are not favoured in law; and therefore he that will avoid a former will by revocation, must see he prove it well (1). 2. A good testament may become void by cancelling or other destruction of it; as where the testator himself, or some other by his commandment, doth cut or tear it in pieces, deface it, or cast it into the fire; by this means the testament is made void; except it be in case where the testator doth it unadvisedly, or it be done by some other without his consent, or by some casualty, or when he doth willingly pull away the seals, and then he doth afterwards seal it again, or where the whole testament is not cancelled or defaced, but some or the chief part thereof, as the naming the executor, or the like, for it is good still for the residue; or where there be several papers or writings, of one, ten, or each of them, containing the whole testament, the cancelling or defacing some of them doth not hurt the testament, unless it can be proved that the testator's mind were to avoid it all; or where the testament is lost in the life-time of the testator, or after; for in this case, so much as can be proved by witnesses is still in force. 3. A good testament may become void by alteration of the estate of the testator; as when a man, after the time of \* making the testament, and before his death, is convicted or condemned of some great crime, for the which the law deprived him of the making of a testament, as treason, felony, or the like. And yet if the crime be pardoned and purged before his death, the testament may be good enough. And if a man of sane and perfect memory make his testament, and after become *inops mentis* as every man for the most part is before his death; this does not hurt the testament. 4. A good testament may become void by an intention only to alter it, when the testator is hindered in his intention, that it cannot take effect: and therefore if when the testator intendeth to alter his testament, or to make a new one, he be by fear or fraud forbidden or letten that he dare not or can-

(1) See fully as to the doctrine of revocation of Wills, either exprefs or implied, which is no less material then extensive, *Com. Dig. Devise (F.)—Bac. Abr. Wills (G.)—Swinb. 523.—Eq. Ca. Abr. Wills (E.)—Vin. Abr. Devise (O.) to (Z.)—God. Orph. Leg. 51.—Went. Off. Ex. 20.*—and the following cases, which do not appear to be inserted in the 4th edition of *Bac. Abr.* lately published—*Beard v. Beard, 3 Atk. 72.—Carte v. Carte, 3 Atk. 176.—Darley v. Darley, 3 Wils. 6.—Parsons v. Freeman, and others, 1 Wils. 308.—Goodright v. Glasier, 4 Burr. 2512.—and Goodright v. Harwood, fully reported in 3 Wils. 497:* In that case a writ of error being brought, the judgment of the court of Common Pleas was reversed by the court of King's Bench, and on an appeal to the house of Lords in April 1775, the decision of the King's Bench was affirmed, *altho' some in the latter part of the writ apply to revision of decision & not to the writ itself, but there are cases which relate to the point at issue in which the latter part of the writ is a revision* not

*Good as to  
themselves but has  
as to reality  
Walsby v. Ashmole  
7 S.R. 138  
as to evidence not  
admitted to testify  
a mistake made by  
a codicil referring  
to another will*

*query whether he  
can licence him.  
Pybus v. Smith.  
a former court only  
allows a former will  
to the testator. By can-  
celling of it.  
which  
under him so.*

*12. Gas Ab. 407  
A second will  
superseding the first  
a former will, shall  
not revoke it, unless  
it be good as a will  
itself, otherwise it  
is second intention  
in revocation.*

*Short v. Smith  
4 East. 419  
Larkins v. Larkins  
3 Bro. P.C. 16  
Windsor v. Smith  
2 Bro. & Ring. 650*

*3. By alte-  
ration of  
the estate of  
the testator.  
\* P. 412.*

*as to where a man  
desired to be buried  
and two houses &  
then married &  
died v. York  
1 V. & B. 260*

*Fourthly,  
by intention  
to alter it.*

*Beal*

*Parson v. Smith  
to prove he was  
admitted to  
make  
a last will &  
3 P.R. 46  
Lit. Bro. 469*

*Swin. lib 7  
part sect.  
16.*

*Swinb. lib.  
7. sect. 17.*

*Co. 4. 62.*

*Swinb. part  
4. sect. 18.*

*Swinb. p.  
7. sect.  
Perk. fe  
479.*

*Perk. fe  
501.  
Co. 1. 9  
2. 55.*

*Perk. fe  
479.  
Co. 4. 6  
Plow. 3*



not alter it, or the Notary or the witnesses dare not or may not be suffered to come to him; as when a wife or some other that is to have benefit by the former will, under pretence that she hath a charge from the physician that none should come at him, or under pretence that he is asleep, or the like, will not suffer any body to come at him; or when the Notary and witnesses are all present, and they make such a noise or quarreling that they hinder the effect of his intent; or when the testator is kept from doing it by importunate requests and flattering persuasions; in all these cases, and by these means, the former testament may become void. But if it appear, that the testator hath no purpose to alter the testament when he is let as aforesaid; the fear is a vain fear. If the testator is prohibited at another time, and not the time when he doth intend to alter the testament, but he hath sundry opportunities after that time to do it, and doth it not; or if he is drawn only by the fair speeches of a wife or friend; or if by the weeping or other trouble arising from the grief of the legatary or executor for the testator's sickness only he is disturbed; in these cases, perhaps it may not be void. And where it is void by the prohibition of a legatary only, it is void for so much as doth concern him only, and not for the rest of the testament.

5. A good testament may become void by making another of the same date; for if two testaments be found after the death of the testator, and it cannot be discerned or proved which was made former or latter; the one of them doth overthrow the other, and both of them are become void, except they be both to the same purpose, or one of them be made in favour to wife and children, &c. and the other to strangers. And yet in the first case also the testator by declaration of his mind, which of them he will have to take effect, may make either of them good. 6. A good testament may be made void by the declaration of the testator's mind; as if a man have two testaments lying by him, the one made after the other, and they are both shewed or delivered to the testator when he lieth sick, and he by word or sign declare \* that he will have the former to stand; this declaration doth revoke the latter, and affirm the former. And where a man would revoke a will for any of these causes, he must presently after the death of the testator put in a *caveat* or exception in that court where the will is to be proved, and thereupon proceed to question it; or by a prohibition in some cases he may stay the probate in the spiritual court. See more *infra* at numb. 12.

If a woman covert, without the leave of her husband, make a testament of her husband's goods, and the husband doth after her death connive at the probate, and deliver the goods accordingly, hereby the testament of the wife is become good: but if an infant, or mad-man, make a testament in the time of his infancy, or madness, and after the infant or mad-man become of full age, or sober, before his death; it seems these testaments are void. And yet if the infant at his full age, or the mad-man when he is sober, make a publication of this testament, it may perhaps be good.

If a man make a former and a latter will, and by the latter the former is revoked, and after the testator declare himself that the former shall stand; by this the former, that was void before, is now

*gives*

Fifthly, by making another of the same date.

*not by hand*

Sixthly, by the declaration of the testator.

\* P. 413.

6. Where a testament void or voidable in its inception, may become good by some matter or accident *ex post facto*: and where not.

Swinb. part.  
7. sect. 11.  
Perk. sect.  
479.

Perk. sect.  
501.  
Co. 1. 99.  
2. 55.

Perk. sect.  
479.  
Co. 4. 61.  
Plow. 344.



seems a devise of lands to any such person is good within the statute of wills. <sup>a</sup> A devise to an infant in the womb of its mother at the time of the death of the testator, is void. <sup>b</sup> And yet if a man devise to such an infant, and he happen to be born before the death of the testator, it seems in this case the devise is good; for it is a rule, <sup>c</sup> that the devisee must be capable of the thing devised at the time of the death of the devisor, if it be then to take effect in possession; or if it be a remainder, he must be capable of it at the time when the remainder shall happen, or otherwise the devise is void (1). And a man may devise his lands, goods or chattels, to his own wife, as well as to any other. 2. But he that may be thus a devisee, and is capable of a thing devised, must be certainly named and described; for if a devise be to a person altogether uncertain, the devise is altogether void. And therefore if I give my land to my best friend, or to my best friends, these are void devises. So if I give my land to a Vicar, and say not to what Vicar; this devise is void, and no averment will help in this case. If one have two sons of one name called *I. S.* and he devise to his son *I. S.* without any distinction; it seems this devise is void for uncertainty: but in \* this case perhaps an averment which son is meant, may help. So if one give to *I. S.* 20*l.* and there be two or more of that name, this devise is void; except it may be proved by some thing which of them he meant. So if one say in his testament, I give to one of the world 10*l.* this devise is void for uncertainty. So if one give him 10*l.* whose name is written in a schedule in the custody of such a man; and in truth there is no such schedule in the custody of such a man to be found; or if there be no name written therein; it seems these legacies are void for uncertainty. So if a man give a legacy to a man uncertain, and no such man is to be found, and the meaning of the testator cannot be known; this devise is void. And yet if a man by his will say thus, I devise to him that shall marry my daughter; this is a good devise; and he that doth marry my daughter in my life-time, or after my death, shall have it. And if a man devise any thing *ad pias causas*, as to the church, or to the poor, not expressing what church or poor; this perhaps may be a good devise. So if a man give 20*l.* to his kindred; it is said this is a good devise, and that a reasonable exposition shall be made of it, as near the intent of the testator as may be; *viz.* that those in the next degree shall have it first, and then those in the next degree to that shall have it afterwards; and if it be a devise to the kindred of another man, that they shall have it equally. (*Sed quære* of this devise, for it seems altogether uncertain.) So if a man give to *I. S.* or *I. D.* 20*l.* this is held to be a good devise, albeit it be somewhat uncertain, and the disjunctive shall be taken for a copulative, and so *I. S.* and *I. D.* shall take both by this devise; but if, in this case, one of them be nearer of kin than the other, then it is said he shall have it for his life, and the other afterwards. And if one devise 20*l.* to *A.* or *B.* which of them *I. S.* will appoint; this is a good devise, and he that *I. S.* shall appoint shall have it. And if one devise to *I. S.* and his

*Devise Clarke*  
2 H. Bl.  
*An infant in*  
*ventre sa mere*  
*may always be*  
*considered as born*  
*when a purchase*  
*comes in some case*  
*I devise; as if a*  
*man leave a legacy*  
*child a devise, but*  
*a son en ventre sa*  
*mere, the son will*  
*not be entitled to*  
*the money he is to*

Incertainty.

Averment.

*Thomas v. Thomas*  
6 H. Bl. 611  
*Carlyle v. Carlyle*  
\* P. 415  
*See the case*  
*See the case*  
33 B. & Cl. 632  
8 Taunt. 386

1 Brown 52

*Devise Plumtree*  
3 B. & Ald. 474  
*Devise to the next*  
*of kin of the testator*  
*name went to his*  
*heir.*

(1) The law is said to be now clear, that a devise to an infant *en ventre sa mere* is good enough, though he be born after the death of the testator, and he shall take by way of executory devise when he is born; per *North Ch. J.*—*Freem.* 293.—See more amply as to a devise to an infant *en ventre sa mere*, in *Win. Abr.* Devise (1. 9.)—*God. Orp. Leg.* 101.—*Bac. Abr.* Infancy (C.)—*Swinb.* 251.—*Fearne on* *Cent. rem.* 3d edit. 324, 401, 425.

children;



In what cases  
devise shall be  
deemed void for  
incertainty of person  
to take.  
Bar. Abr. Devise 23  
Co. Litt. 266. 4. 3

Mr. Pulton considers  
this good.

children; this is a good devise and certain enough; and hereby he and his children shall take the thing devised together. 3. And as the person to whom the devise is made, must be capable, and certainly described and named, so must he be capable by that name by which the devise is made to him, or otherwise the devise is void. And therefore if a devise be to the heirs of *I. S. I. S.* being living; this devise is void. And yet if lands or goods be devised to the executor of *I. S.* and *I. S.* die before the testator and make executors; this is a good devise to the executors. And if a Fitz Devise man devise his land to *I. S.* for life, the remainder to the next of kin, [or next of blood] of *I. S.*; this is a good devise of the remainder. And if a man devise goods to the parishioners of the parish of *S.* to the use of the church; this is a good devise, and the church-wardens may recover it. And if a man devise *ecclesie*

- \* P. 416. *sanctæ Andreae de \* Holborne*, it seems this is a good devise to the Parson of that church. And if a man devise to the City of London, University of Oxford, or to Queens College in Oxford, these are good devises. But if one devise to the commonalty of a guild that is not incorporate, as to two of the middle men of the guild of the fraternity of *Whiteacres* in London, or the like; this devise is void (1).

Misnaming.

4. That if the person be capable, well named, and capable by that name, if his name be truly set down, yet if his name be not so, but mistaken, the devise is void. And therefore, if one intending to give 20*l.* to *I. S.* devise to *I. N.* 20*l.* this devise is void both to *I. S.* and *I. N.* except the person be certainly denoted and described be some other circumstance, as to *I. N.* the son of *I. S.* my landlord, or the like. So if one devise to the abbot of *St. Peter*, when the foundation is the Abbot of *St. Paul*; this devise is void. And if one devise to a corporation, and there be none of that name at the time of the devise, nor during the life of the testator, this devise is void: and so also it seems the law is, if there be a Colledge made after of that name. But if one devise a thing to the wife of *I. S.* and before the deviser die, *I. S.* die, and she take another husband, and is called by another name, yet this devise is good. So if one give a legacy to *I. S.* Dean of *Pauls*, and the Chapter there, and their successors; and after, before the death of the deviser, *I. S.* die, and another is made dean; yet this devise is good notwithstanding this mistake (2). For the third and fourth thing required in a good devise; see before at *numb. 4. part. 2. 3.* And for the fifth thing, it is to be known, first, that land and tenements devisable by custom, may be devised by a nuncupative will without any writing for any time whatsoever, as uses at the common law that are now within the statute might have been. Also those uses that remain at the common law, and are not within the statute,

Fifthly, in respect of the matter touching the matter and form of the devise. And how a devise may be made.

(1) By the common law every corporation had a capacity to purchase lands for themselves and their successors; but they are excepted out of the statute of wills: so that no devise of lands to a corporation by will is good; except for charitable uses, by statute 43 *Eliz. c. 4.* which exception is greatly narrowed by statute 9 *Geo. 2. c. 36.*—See 1 *Bl. Com.* 479. seventh edit.—10 *Co. 30.*—*Hob.* 136.—A devise to a corporation for a charitable use operates in the nature of an appointment, rather than a bequest, under the statute 43 *Eliz.*—that statute, being subsequent, is said to supersede and repeal the Statute of Wills 32 *H. 8.* but the statute of frauds, being subsequent to the statute 43 *Eliz.* renders it necessary, that an appointment of lands to a charity by will should be attested by three witnesses; otherwise it is void.—1 *Pr. Wms.* 249.

(2) See more amply who may take by devise, in *Com. Dig.* Devise (I).—*Bar. Abr.* Devise (A.)

Plow.  
Swinb.  
1. fed.  
Dier 14

Swinb.  
4. fed.  
Plow 2  
Lit Bro  
fed. 31  
Dier 23

Palsch 9.  
Jac. Nev  
man's ca

Plow. 54  
Co. 4. 6  
8. 95-  
Dier 122  
33. 128  
Co. 1. 83  
6. 42  
Dier 4. 3

Dier 139.  
140.

Plow. 523  
Perk. fed.  
16  
See Condi-  
tion.  
Co. 8. 95.

(1) See t  
(2) See t  
life, remain  
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Plow. 345.  
Swinb. part  
1. sect. 12.  
Dier 140.

Swinb. part  
4. sect. 4.  
Plow. 23.  
Lit. Bro.  
sect. 316.  
Dier 23.

Pasch 9.  
Jac. New-  
man's case.

Plow. 546.  
Co. 4. 66.  
8. 95-  
Dier 122.  
33. 128  
Co. 1. 83.  
6. 47.  
Dier 4. 33.

Dier 139.  
140.

Plow. 523.  
Perk. sect.  
16.  
See Condi-  
tion.  
Co. 8. 95.

may be devised by word without any writing (1). But no estate can be made of lands by devise upon the statute, except the devise be in writing; and so a man may devise his land, albeit he make no executor; for an executor hath nothing to do with the freehold of land. Also goods and chattels, leases for years of lands, wards, villains and the like, may be devised by words without any writing at all. And yet it seems questionable whether a lease for years of a rent, common or such like thing, be devisable by word without writing. Secondly, the form of words in a devise is not at all regarded; and therefore if one say, I give, institute, desire, appoint, or will, that *I. S.* shall have my land, or that *I. S.* shall have 20*l.* or let *I. S.* have my land or 20*l.* all these devises are as good as if he say, I devise to *I. S.* my land or 20*l.* And therefore if one at this day since the statute of uses devise that his feoffees of the land shall be \* seised of the land to the use of *I. S.* and his heirs; or to the use of *I. S.* and the heirs of his body; or if such a man devise that his feoffees shall make an estate of the land to *I. S.* and his heirs; or to him and the heirs of his body; this is a good devise of the land in fee-simple, or fee-tail. And if a man make a feoffment of his land to the use of his last will, and then devise that his feoffees shall be seised to the use of *I. S.* this is a good devise of the land *per intentionem*. And if I devise that *I. S.* shall have, hold, and occupy my land for his life; this is a good devise of the land for his life. If a man have a lease for years of land, and he devise his lease or his term, or his ferm, or the profits or occupation of the land; by either of these devises his whole lease and all his interest in the land is given, as well as by any other form of words. 3. A man may devise lands, tenements, or hereditaments in possession, in fee, for life, or years; or he may devise it in reversion, *viz.* to one for life, the remainder to another in fee, or in tail, or in any other sort, as a man may grant it by his deed, and such devises are good. But if the fee-simple of land be devised to one, the remainder cannot be devised to another, albeit the first devise be but conditional. And therefore if land be devised to *I. S.* and his heirs, and if he die without heirs, that it shall remain to *I. N.* and his heirs; this is a void remainder to *I. N.* So if a man devise his land to *I. S.* in fee, *ita quod solvat. I. N.* twenty pounds, and if he fail that it shall remain to *I. N.* and his heirs, this remainder to *I. N.* is void; for if *I. S.* fail of payment, *I. N.* shall not enter and have the land, but the heir of the deviser (2). And yet perhaps a rent may be devised after this manner. Howbeit if another man have a rent-charge of 20*l.* a-year issuing out of my land for twenty years; and he devise this unto me until I have levied a hundred pounds by way of retainer, the remainder to *I. S.*: this remainder is not good. 4. A devise may be of lands, goods or chattels, simply and absolutely, or conditionally; the simple devise also may be *in presenti*, or *in futuro*. And therefore as a devise to one and his heirs *in presenti*, is good; so a devise to one and his heirs after

*Slaves in Spain  
and some others of  
the colonies are  
considered as property.*

\* P. 417.

*If a man devise  
that A and his  
heirs shall convey  
to B & his heirs,  
it seems the legal  
estate will be in A.*

*Elton & Shepherd  
1 Brown 531  
Phillips & Chamberlayne  
2 W. 51.  
Dorby & Keen  
Ambl. 697. 2 pl.*

*not always for  
if I can take as  
heir to I. S. it is  
an estate tail - 28.  
See Fearn 467.*

(1) See the notes before, as to the statute of 29 Car. 2. c. 3.

(2) See the case of *Marks v. Marks*, 10 Mod. 419, where the testator devised lands to his wife for life, remainder to his second son C. in fee; provided that if his third son D. should within three months after the wife's death pay 500*l.* to C. his executors or administrators, then he devised to D. and his heirs, — This devise to D. was held to be a good executory devise. — See *Fearn on Cont. Rem.* 3d edit. 303.

the death of *I. S.* is good. If I devise land to *I. S.* and his heirs on condition, as, so as, or *ita quod*, he pay ten pounds to *W. S.* or paying to *W. S.* ten pounds; or *ad solvendum* ten pounds to *I. S.*; the devise, in all these cases, is a good conditional devise: and if the condition be not performed or broken; the estate is ended, and the heir may take advantage of it. And therefore if lands be so given to the heir, the condition is idle, because none can en-

*His sometimes  
constituted a limitation  
3 Bac. Ab. 455-6*

\* P. 418.

Limitation.

And if I devise that if *I. S.* pay my executors twenty pounds, that he shall have *White acre* to him and his heirs for ever, or for life, &c. this is a good devise, and after the contingent shall take effect accordingly: and in this case and such like, the heir of the deviser must keep the land, until the contingent do happen. In like manner as if it be a chattel, the executor shall keep the thing until the condition be performed; and after a condition broken, he shall take advantage of it. 5. A devise may be also with a limitation, as in the cases before; as where one gives land to another and his heirs, so long as *I. S.* shall have heirs of his body; or where one doth devise his land to *A.* his son and his heirs for ever, paying to *B.* his brother twenty pounds, when he shall come of age; and then that he shall enter and have it to him and his heirs, and if he die without heirs of his body, the said *B.* then living, then that *B.* his heirs shall have it in the same manner: and these and such like devises are good. 6. A man that is seised of land in fee, may devise that his executors shall sell it; or may devise it to his executors to sell; or devise it to his executors, and that they shall sell it; and these devises are good. 7. A devise may be of a rent, or of land reserving a rent, with clause of distress; as if a man devise land to *I. S.* paying ten pounds by the year to his wife, and if it be unpaid, that she shall distrain for it; this is a good devise. But a warranty cannot be made by will. And yet if a man devise land to another for life, or in tail, reserving a rent; in this case the heirs of the deviser shall be bound to the warranty in law, and the devisee shall take advantage of it. 8. A man may devise his land to one, and devise a rent out of the same land to another; and these devises are good. So a man may devise his land to one in fee, and after devise the same land to another for life or years; and these are good devises, and may stand together. So also if a man in the fore part of his will, by general words devise all his land to one in fee, and in the latter part of his will, devise some special part of it to another in fee; these devises are good and shall stand together: as for example, if one have a farm, and in the first part of his will, give this farm to one, and in the latter part of his will give one close (a part of this farm) to another; or if a man devise all his land in *B.* (which is in the county of *Gloucester*) to *A.* his daughter, and in the latter part of his will deviseth all his land in the county of *Gloucester*, in the possession of *I. S.* to his Son, and part of the land in *B.* is in the possession of *I. S.* and in *Gloucestershire*; these are good devises and shall stand together. But otherwise it is when the general clause doth come last, as where one doth give his land to *A.* his daughter, and in the latter part of his will doth give all his land in *Hertfordshire*, and in the possession of *I. S.* to *W.* and the land given to *A.* is in *Hertfordshire*, and in the possession of *I. S.*; in this case the devises will not stand together, for the first devise is void: and so also it is where both the devises are particular; as

*Pells v Brown  
Doe v Ellis  
9 East 381  
Doe v Smart  
Fearn 473. n*

Clause of  
distress.

Warrantia.

*And by Geo. 2  
the devisee has a  
power of distress  
3 Bragg. 392  
Buttley v Robinson  
By 8 Anne c. 14  
he has an action  
of debt for rent-  
service for life  
or lives  
4 M. & Selw. 113  
3 B. & P. 130  
But the statute of  
Anne does not  
help any other  
rent.*

Co. super  
Lit. 112.

113. 236.

Dier 348.

100. 8. 84.

85.

Co. super

Lit. 386.

Plow. 523.

540.

Dier 357.

Co. 8. 94.

83.

17 H. 6. 30.

Lit. Bro.

sect. 388.

354. 209.

Swinb. part

4. sect. 17.

(1) Where

such a limitation

limited for life

—Fearn on

deed of trust

and the dur-

child a few m-

wisely and re-

mitted by way

space.—See

rine, and par-

(2) See acc-

and Upwell v.

If devi-

judicial

16. 117. 8



Dier in his  
Lecture 1.  
& per Just.  
Dodr.

Trin. 9 Ja.  
B. R.

Plow. 523.  
546.

Co. 8. 95.  
Plow. 519.  
546. 516.  
539.  
Dier 277.

Co. 10. 87.  
47. Pasche.  
17 Ja. B. R.  
Child v.  
Bailey.

17 H. 6. 30.  
Lit. Bro.  
sect. 388.  
334. 209.

Swinb. part  
4. sect. 17.

where first in a man's will, he doth give *White-acre* to *A.* and his heirs, and after in his will he doth give *White-acre* to *B.* and his heirs; in this case the first devise to *A.* is void. And yet in this last case, some have held the devises shall be good, and that *A.* and *B.* shall be joint-tenants: *ideo quare*. If one devise all his land to *I. S.* and his heirs, excepting twenty pounds for seven years, which he willethe shall be employed for his children; this is a good devise of this sum of twenty pounds a-year. 9. And a man may devise his land for so many years as *I. S.* shall name, and after appoint that his son shall have it during the minority of his son, and both these devises may stand together: and therefore if *A.* be possessed of the manor of *D.* for years, and he deviseth all his term to his eldest son if he live so long, and if he die before he have any issue of his body, then to his younger son in the same manner, but withal he doth appoint that his wife shall have the occupation of the land until his eldest son be one-and-twenty years of age; these devises shall stand together, and the wife shall enjoy the manor for that time, by this devise. 10. A man may devise a term of years by way of remainder: as for example, a man that is possessed of a term of years of land, may devise it to *I. S.* for life, the remainder to *I. D.* or to *I. S.* for life, and that it shall after remain to *I. D.* or to *I. S.* for so many years as he shall live, and after to *I. D.* or in any such like manner; these are good devises both to the first, and to him in remainder also by way of executory devise, though not by way of remainder; and in this case, the first devisee cannot hinder the second devisee of the remnant of the term. But a man cannot by deed in his life-time grant his term in this manner: nor if a man be possessed of a term can he intail it by his will; and therefore if a man possessed of his term of years of land devise his term or his land to *I. S.* and his heirs, or to *I. S.* and the heirs of his body, or to *I. S.* and his issues, the remainder to *I. D.* this remainder is void, and it is a good devise of the whole term to *I. S.* and his executors (1). Also the use or occupation a chattel personal may (as it seems) be devised to one for life, and afterwards to another; but yet so as the latter must have the property only, and the first but the occupation only: as if one devise that *I. D.* shall have the occupation of his plate for his life, and after that it shall remain to *I. S.* this is a good devise of the plate to *I. S.* (2). But if the thing itself be devised to the first of them, then the devise to the second is void, for the gift of a chattel personal for one hour, is the gift of it for ever. And so it did seem in the *Lady Davers* case. *Hil. 9. Car. B. R.*

\* P. 419.

Grant.

*The devise of the thing and of the use is now all one.*  
*Fearne C.R. 405-6*

(1) Where a term for years or any personal estate; was devised to one for life, with remainder over; such a limitation was void at common law, and the whole property vested in the person to whom it was limited for life; but the law is now settled, that such limitations over in a will or by way of trust are good. — *Fearne on Cont. Rem.* 3d edit. 304. — Terms for years may be intailed by executory devise or by deed of trust as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps in the case of a posthumous child a few months more; a limitation of time, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. — See note 5 to 13th edit. *Co. Lit.* 20. a. and the authorities there collected as to this point of doctrine, and particularly the *Duke of Norfolk's* case. 3 *Cha. Ca.* 1.  
(2) See accordingly the cases of *Hyde v. Parrat*, 1 *Pr. Wms.* 1. — *Tiffen v. Tiffen*. — *Ibid.* 500. — and *Utwell v. Halfey*, *Ibid.* 651.

D d 2

certain

*If devise for life, tenant can maintain ejectment for he has a possibility coupled with a legal interest* *Paramour v. Yardley* *Plowd.* 539  
16. 47. 8 *Fearne C.R.* *Adams v. Pearce* 3 *Plow.* 12  
*Young v. Holmes* *Change* 70

certain time, or from or after a time certain or incertain; as for five years, or from, or until the marriage of *A.* or the like; and these dispositions are good. 12. A man may devise his land for so many years as *I. S.* shall name, and if *I. S.* do name a certain

\* P. 420

Sixthly, in respect of matter touching the thing devised, and what may be devised and by what name. Devised of lands and testaments.

number of years in the life-time of the devisor, \* this will be a good devise. But if one devise his land for so many years as his executor shall name, it seems this devise is not good. 6. As touching the sixth thing required in a good devise, these things are to be known. 1. That lands, tenements, and hereditaments for the nature and quality of them are devisable as well as other things. And therefore by the custom of some places lands in possession, reversion or remainder, are devisable in fee, for life, or years; and a man that hath a lease for years of land may devise the land at his pleasure during his term. But by the ancient common law, in favor to heirs, the lands that a man had in fee-simple were not devisable by testament, except only in some special places, by the custom of the place, as gavelkind lands in *Kent*, and lands within certain burrough towns, as *London, Oxford, &c.* And by the custom of those places such lands are devisable: and in some places the custom is, that they may devise their purchased lands only; and in other places, that they may devise their lands descended also: and in some places the custom is that they may devise for life only; and in other places, that they may devise in fee-simple and fee-tail also. And in all these places where such customs are, they may devise their lands now as they might have done before the statute; for the statute hath not destroyed their custom. And therefore at this day they that have such lands in such places, have their election either to devise according to the power the custom doth give them, or according to the power the statute doth give them; and in the first case, the devise is good against the heir for the whole; and in the last case it is good against him for two parts in the three only. Also by the common law, the uses of land were devisable, as goods and chattels were, at the pleasure of him that had them. But otherwise, and in other cases, lands and tenements might not be devised and disposed by will, until *H. 8.* at which time the owners of lands, tenements, rents, &c. were by Act of Parliament enabled to devise and dispose their lands as followeth: he that hath any land in possession, reversion, or remainder by socage tenure, and hath no land held *in capite* or by Knight's service, may devise all his land, or any rent, common, or other profit *apprender* out of it, to any person in fee-simple, fee-tail, for life or years, at his pleasure. He that hath any such land held of the King *in capite* by Knight's service, or by Knight's service and not in chief, or held of any common person by Knight's service, may devise two parts thereof in three, to be divided, or any rent, &c. out of those two parts at his pleasure, and no more; for the third part must descend to the heir, and come to satisfy the Lord his duties; and therefore the devise of the whole land in this case is void for the third part. He that hath any such land held by Knight's service *in capite*, and other lands held by socage tenure may devise two parts of the whole, and no more, or any rent, &c. out of it at his pleasure: he that doth hold land of the King by Knight's service only, and not *in capite*, as if a mean Lord by Knight's service, hath also other lands held by socage tenure, he may devise two parts in three of all the land held

Does not relate to copy holds

By 12 C. 2. Knight's service is taken away.

Dier 371.  
Co. 8. 83.  
6. 16.  
super Lit.  
111.  
Perk. fed.  
499 500.  
497-538.  
Lit. fed.  
167.  
Dier 155.  
Old N. B.

See the Statute  
Co. sup.  
Lit. 111.  
Perk. fed.  
544.  
Lit. fed.  
287.  
Dier 21.  
Old N.  
80.  
Perk. fed.  
500. 53.  
540. 49.  
497, 498.

Co. 10. 1.  
3. 32.  
super Lit.  
111.

Co. 10. 8.  
81.  
super Lit.  
111.  
Co. 3. 35.  
30. 34.

(1) A man last will: lands do not surrender.  
(2) But tested by them to be  
(3) See *Case v. Ro*  
continuance  
Wills in 32  
time of man

held in  
all if such  
to such  
any other  
help from

See the  
Statute  
Co. super  
Lit. 111.  
Perk. sect.  
544.  
Lit. sect.  
287.  
Dier 210.  
Old N. B.  
80.  
Perk. sect.  
500. 539.  
540. 496.  
497. 498.

Co. 10. 81.  
3. 32.  
super Lit.  
111.

Co. 10. 81.  
81.  
super Lit.  
111.  
Co. 3. 35.  
30. 34.

held by Knight's service or any rent, &c. out of it, and all his socage land at his pleasure. So that now, by these statutes, a man that hath lands in fee-simple, may devise them in fee-simple, fee-tail, for life, or years, absolutely, or conditionally, at his pleasure. And therefore if one devise his land to one for life, the remainder in fee, or fee-tail to another; or devise his land to B. the remainder to the next heir male of B. and the heirs male of the body of such heir male, or the like; these are good devises. But for the more full understanding of these things, it is to be known in the next place, 2. That this statute doth not enable men to devise land, that are disabled by law in respect of their persons or minds, as infants, women covert, men *non sana memoria*, or the like; nor such as are disabled in respect either of the nature of their land, as copyholders (for copyhold land is not devisable) (1); or of the estate they have in land, as tenants in tail, or *pur autre vie* (2), or joint-tenants; for these can no more devise their land they do so hold, than they could before the statute. But such as are seised of land in common, or coparcenery, may devise their land as well as those that are sole seised. And if two be joint-tenants for life, the fee-simple to one of them; he that hath the fee-simple, may devise his fee-simple after the death of his companion (3). Neither doth this statute enable those that are seised of lands in fee, in the right of their houses and churches, to devise the same lands: and therefore, Bishops, Deans, Parsons, Vicars, Masters of Hospitals, or the like, can no more devise the lands belonging to their Bishopricks, &c. than they could before the statute; but the lands they are seised of in their own right, they may devise like other men. 3. Hereditaments that are not of any yearly value, are some of them devisable, and some not; for if the King grant to one and his heirs *bona & catalla felonum & fugitivorum vel utlagatorum*, fines, and amercements within such a manor or village; in this case, the owner can neither devise these things to another, as part of the two parts, nor leave them to descend for a third part. And yet if one have a manor unto which a leet, waif, estray, or the like, is appendant or appurtenant; there, by the devise of the manor with the appurtenances, these things may pass as incident to the manor: but if a man have an hundred, with the goods of felons, out-laws, fine, amercements, *retorna brevium*, and other such casual hereditaments within the same hundred, and these have been usually let to farm for a rent; in this case, these things may be devised \* or left to \* P. 422. descend for a third part. 4. Such uncertain franchises, as before, that are hereditaments of no yearly value, albeit they are not de-

(1) A man cannot devise a copyhold by will at the common law, but must surrender to the use of his last will and testament, and in his will must declare his intent. *Co. Comp. Cap. 83.* — Copyhold lands do not pass by the will, but by the surrender; for the will is only declaratory of the uses of the surrender. *1 Bull. 200.* *Where a man purchases copyholds subsequent to making his will, and surrenders them to the use of his will, and afterwards makes a codicil, the copyholds are not devised by the will, but by the codicil.*

(2) But by the statute 29 Car. 2. c. 3. § 12. Estates *per autre vie* are devisable by a will in writing attested by three witnesses; and if such estates are not devised, the statute 14 Geo. 2. c. 20. § 9. directs them to be applied and distributed as personal estate. — See before in page 104 and note 3 thereto.

(3) See the case of *Wooden v. Baldwin*, Sir T. Raym. 40. — In *Swift* on the demise of *Neale* and the wife v. *Roberts* in *B. R. 3 Burr. 1488.* the court held "that a will made by a joint-tenant during the continuance of the jointure, is not a good will (even as to his share of the estate) under the statutes of wills in 32 & 34 H. 8. notwithstanding a subsequent severance of the jointure by a partition made after the time of making the will and before his death; unless there be a republication of it, after the partition"

visable, though in particular

directed in the *Codicil Doe v. Cary* Douglas 590. — Copyholders purchased in the will if surrendered to the uses declared by the will, pass *Neale v. Neale* Cro. 130. — In such case as A shall appoint to his will will pass. *Spring v. Byles* 19 R. 435. — Any whether a devise would not pass after purchase copyholds as it is held not pass. Freeholds only on account of the word 'having' in the statute which does not hold to copyholds.



visable, yet may restrain the devise of a man's lands and tenements, and make it void for a third part, if they be held *in capite*; for it is not requisite, that the thing, held by the tenure *in capite*, be devisable: and such things as may not be left to descend to the Lord for a third part, and to satisfy him his duties, may notwithstanding be devisable, or restrain the devise of other lands and tenements, and make it void for a third part. And therefore a reversion upon an estate tail, which is dry and fruitless, if it be holden of the King by Knight's service *in capite*, will hinder the devise of the third part of a man's lands and tenements: also an estate tail, of lands held *in capite*, may restrain the devise of a third part of other lands. And therefore, if such lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in socage; if he have any issue, he can devise but two parts of his socage land. And where the statute speaks of a remainder, it is to be intended of such a remainder only, as may draw ward and marriage by the common law, and this is that remainder only, that doth hinder a devise. And therefore if *A.* be seised of land, in socage tenure; and *B.* be seised of lands in fee, held *in capite* by Knight's service; and *B.* make a lease for life, or gift in tail, to *C.* the remainder to *A.* in tail, or in fee; in this case, *A.* during the estate for life or in tail, may devise all his socage land, notwithstanding this remainder. But if a man make a lease for life or years, and after grant the reversion for life or in tail, the remainder in fee, and after the grantee for life dieth, or donee in tail dieth without issue; in this case, this remainder which now is in point of reversion, will restrain the devise of other lands, and make it void for a third part. 5. In all cases where a man is restrained to devise any part of his lands held in socage, he must have lands held *in capite* at the same time; and therefore the time of having lands to devise, and holding of other lands *in capite*, and disposing of the lands to be devised, must concur. And therefore if a man be seised of an acre of land in fee, held of the King in chief by Knight's service, and of other two acres in fee held in socage, and enfeoff his younger son of the acre held *in capite*, and of one of the other acres, or convey it to the use of his wife, or for the payment of his debts, &c. and after purchase lands held in socage; in this case, he may devise all the new purchased land held in socage without restraint. So if a man be seised of lands held by Knight's service *in capite* in possession, reversion, or remainder, and of lands held in socage; and, by his will in writing, doth devise all the said lands; and after the land held *in capite* is recovered from him, or aliened by him *bona fide*; in these cases, the devise is good for all the land held in socage: and hence it is, that if the king grant land to one in fee-farm to hold in socage at a rent, and after grant this rent to another and his heirs, to hold *in capite*, and the grantee of the rent doth grant it to him that hath the land; in this case, because the rent is extinct, and he cannot be said to hold lands *in capite*, this shall not restrain the devise of any of his lands. And yet if a man hold some lands by Knight's service *in capite*, and other lands in socage, and be disseised of the lands held *in capite*; he cannot devise all his socage land, but the devise will be void for a third part, for he is said to have that land still, whereof he hath the right. And albeit the statute say, that he that hath lands held of the King

\* P. 423.

Co. 10. 81.  
11. 24. 3.  
30. 34. 35.  
super Lit.  
111.  
Dier 158.

Co. 3. 34.  
11. 24.

Co. 3. 32.

Co. 10. 84.

Co. 3. 33.

Co. 10. 84.  
3. 34.

in

*in capite*, and other lands in focage, may give two parts for the advancement of his wife, payment of his debts, preferment of his children; whereby he is restrained to devise any more. And therefore, if, by act executed in his life time, he convey two parts to any such uses or intents, he cannot devise any more by his will, but the residue must descend, yet this also is to be intended of the land he hath at the same time. For if a man be seised of lands held in focage of the yearly value of twenty pounds *per annum*, and he hath not any land held *in capite* by Knight's service, and he make his will in writing, and by it devise the focage land to one in fee, and then purchase land to the value of twenty shillings *per annum* held *in capite*, and die; this will make the devise void for a part of the land that is held in focage. But if a man, seised of land in fee of focage tenure, assure it to the use of his wife for her jointure, and after purchase lands held *in capite* by Knight's service; he may devise two parts in three of all this *capite* land, and the King shall not have any thing out of or for the focage land.

Co. 3. 34.  
11. 24.

If a man seised of lands, part of which are held *in capite*, and part in focage, make a feoffment of the lands, held *in capite* (being two parts in three of the whole) to the use of him and his wife for life, with divers remainders over; in this case he may not, devise any of the focage land. And if a man have no focage land, but *capite* land only, and convey it away in fee-simple, keeping no reversion to any such use, and after purchase focage land; he may

Co. 3. 32.

devise all the focage land newly purchased. 6. As the testator, enabled to devise by this statute without restraint, is and must be one that hath the land he doth devise, at the time of the devise made, and no other land then to be an impediment to his devise, so he must have a sole estate as well in the land he doth leave to descend to the heir, as in the land he doth devise: and therefore, if lands held *in capite* be conveyed to a man and his wife, and the heirs of their two bodies; and this man hath other lands whereof he is sole seised, held of the King *in capite* by Knight's service; in this case, he may not devise two parts of the whole, supposing

\* this may suffice for the King's third part; for he may devise but two parts of the residue; *i. e.* of that whereof he is sole seised, either at the time of making of the will, or at the least at the

Co. 10. 84.

time of the death of the testator. 7. The estate of the land that is held must continue after the death of the tenant: otherwise it will be no restraint. And therefore, if tenant in tail be to him and the heirs males of his body, the remainder in fee to another, of lands held by Knight's service *in capite*; and he is seised of other lands in focage in fee, and by his will in writing devise all the focage land, and die without issue male; in this case, the devise is good for all the focage land. And so also it is where the estate which the ancestor had of the land held, is defeated by condition; which the ancestor had of the land held, is defeated by condition; *descend to the heir.*

Co. 3. 33.

8. That which a man cannot dispose by any act in his life-time, shall not be taken for any such manors, &c. whereof a man may devise two parts by authority of this statute at his death: and therefore in the case of an evident estate of lands between husband and wife, where the husband can make no disposition for longer time than during the coverture, these lands are not to be esteemed such as are to be accounted amongst the lands, whereof two parts in three are devisable. 9. The tenure by Knight's service must

Co. 10. 84.  
3. 34.

continue

*There seems to be that others may have the lands.*

continue after the death of the deviser, otherwise the land so held will be no restraint. And therefore if the King grant land to one and his heirs, to hold during his life by Knight's service *in capite*, and after in socage; or to hold during his life in socage, and after by Knight's service; in these cases, the grantee may devise all his land, notwithstanding the tenure of this land. 10. The King or other Lord must have a full and clear yearly value of the third part left to descend to him, and the value is to be esteemed as it is, and doth happen to be at the time of the death of the testator; for the King, or other Lord, must have the like or equal benefit for his third part, as the devisee hath for the two parts, without diminution or subtraction; when therefore a man will have his devise good for the residue, he must take care that the third part be so left; for if the third part be not valuable, or be charged with any rent, &c. or be upon any uncertainty, as if it be upon a possibility only; as where a man and his wife be seised of a joint-estate tail made during the coverture, and he devise other lands to her on condition that she shall waive her estate made during the coverture, and so intend that that part of his land shall be left for the King's part; this devise will not be good for the residue; and albeit the wife do waive the estate after the husband's death, yet this will not help the matter, or make the devise good for that part for which it was void before: but it is not material by what tenure the third part descending be held: for it is held by the better opinion, that if a man be seised of 20*l.* land held of the King *in capite*, and 10*l.* land held of a subject by socage, and he devise all the *capite* land \* to a stranger; that this is a good devise for the whole, and that the King shall be satisfied by the socage land. And if it be of the value of the third part, albeit it be but of an estate tail whereof the ancestor was seised, or if it be new purchased land, yet it is sufficient: and therefore, if some lands be given to a man, and the heirs of his body of the value of 10*l.* *per annum*, and he be seised of other lands in fee-simple, to the value of 20*l.* *per annum*, and all or part of these are held *in capite* by Knight's service; in this case, he may devise the lands in fee-simple, and leave the entailed land to descend for a third part: and if a man be seised of such land, and convey to the uses within the statute, or any of them, and after purchase new land, and leave that to descend, this is sufficient. 11. The third part that is left to descend to satisfy the King or other Lord must descend immediately, and he must not stay for it. And therefore if a man be seised of three acres of land held by Knight's service *in capite*, and make a lease of one acre for life, and after devise the other two acres; this devise is not good for the whole two acres, but for two parts in three thereof only: and albeit the tenant for life die afterwards, yet this will not help the matter. But if the deviser leave a full third part immediately to descend in fee-simple or in fee-tail, he may devise the other two parts at his pleasure. And if he do not leave a third part to the full, it must be made up and supplied out of the other two parts, which in case of the King is done by commission out of the court of wards, and in case of a subject by commission out of the chancery. 12. The third part left to descend, must be of as good value as either of the other two parts is at the time of the death of the testator, or otherwise the devise of all the residue will not be good, for so must it be taken out of

\* P. 425.

Co. 3. 31.  
31. super  
Lit. 111.  
10. 48.

Co. 3 34

Co. super  
Lit. 111. 9.  
133. 3. 34

of

Co. 3  
lers and  
BakersCo. 10  
Leonar  
Leovei  
cale.  
Co. 11



of the lands of the testator indifferently : and therefore, if a man be seised in fee of land held in chief by Knight's service, and make a feoffment of the one half of it to the use of himself for life, and after to the use of one he doth intend to marry, and after to the use of another in remainder, or to any other such like uses within the statute, and after he doth marry the same woman, and after he devise the other moiety to his wife, children, or any other ; In this case, albeit the wife's estate have precedency, yet the King shall have the third part of both the moieties equally. So if one be seised of gavelkind land held *in capite*, and, his son being dead, devise part of it to one of his grandchildren, and part of it to another, and part to a third in tail ; in this case, the King's third part shall come of all the three parts equally, and accordingly the devise will be void for so much to every one of them. So if one hold three several manors of three several lords ; he cannot devise two of these manors leaving a third to descend ; but he may devise two parts of every of the three manors, and a third part of each manor must \* descend to each Lord, for there must be an equality \* P. 426. in these things. For further illustration of which things, the examples following are to be heeded. *W. B.* being seised of the manor of *Toby* in *capite*, and of lands in *Fobbing* held in socage in fee, and he and his wife being seised of the manor of *Hinton*, held in *capite*, to them and the heirs of their two bodies begotten, by an estate made to them during the coverture, for the jointure of the wife, the reversion to *W.* in fee, and *Toby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W. B.* by his will in writing, doth devise *Toby* to his wife for life, upon condition that she shall not take her former jointure, with divers remainders over, and die, and she refused her former jointure in *Hinton* ; in this case, it was adjudged that the devise was not good for the whole manor of *Toby*, and that the manor of *Hinton* was not a sufficient third part to descend. *L. L.* being seised of the manors of *Affaland*, *Heauton*, *Rillaton*, *Pengelly*, *Willesworthy*, and *Trivesquite* (the last only held in *capite*) in fee, and having issue *Thomas* his eldest son, *William*, *Humphrey*, and *Richard*, younger sons, which *Richard* had issue *Leonard*, makes a feoffment of these manors to divers uses, *viz.* of the manors of *R. P. W.* and *A.* to the use of the feoffor for life ; and after to the use of such person as he should appoint by his last will, and after to the use of *W.* his second son in tail, and after to his other sons in tail, and after to the use of the feoffor and his wife in tail, and after to the use of the feoffor and his heirs for ever ; and of the manor of *H.* to such like uses ; and of the manor of *T.* also to such like uses ; and the same uses were with power of revocation : and after the feoffor purchased eight acres of other land held in socage, and after did revoke the uses of the manors of *R. P. W.* and *A.* and after devised some of the said manors (excepting some pieces) and the said eight acres of land to his eldest son and the heirs males of his body for five hundred years on certain conditions, and if he die without issue, that it shall go to *William*, &c. and afterwards he die seised of the said eight acres of land, and the lands devised by the will at the time of the death of the testator were of the yearly value of 24*l.* 14*s.* 10*d.* per annum, & non ultra, and the lands whereof the feoffment was made, and not revoked, were at the time of the death of the testator of the value of 55*l.* 6*s.*

Co. 3 But-  
lers and  
Bakers case.

Co. 10. 78.  
Leonard  
Leoveis  
case.  
Co. 11. 24.

6s. 8d. in this case, it was adjudged that the devise of the eight acres newly purchased was void at least for a third part, and restrained by the reversion in fee expectant upon the estate tail made to the younger son of the manor held *in capite*. And it was resolved, that if a man be seised of three acres of equal yearly value, one of them held of the King by Knight's service *in capite*, and have issue two sons, and give the acre so held, and another of the acres, to his younger son, whereby he hath so executed \* his power by the statute, that he cannot devise by his will any part of the third acre; and after he purchase three acres of equal value held in socage; that in this case, because he hath the reversion in fee upon the estate tail made to the younger son, he can devise no more but two parts of the said land so newly purchased: but if the reversion be gone before the purchase, he may devise the whole. Co. 6. 16. But if a man be seised of lands in fee, part of which are held of the King *in capite* by Knight's service, and he convey two parts of it unto any of his sons, or to the use of his wife for life, or in tail; in this case, albeit he may not devise any part of the residue, yet he may by his will devise the reversion of the two parts. And in case, where he hath not conveyed the full two parts, he may devise so much as to make up that he hath conveyed full two parts: and it was further resolved in the same *Leonard Loveis* case, That whereas the statute saith, all persons, &c. having, &c. any manors, &c. in possession, reversion, or remainder, &c. and the feoffor *L. L.* in the case before had a remainder in tail expectant upon the estates in tail limited to the sons; that this remainder was not within the statute, nor would have restrained the devise, but for the reversion in fee afterwards. *A. B.* being seised in fee of the manor of *Gracediu* held *in capite*, and of the value of thirty pounds *per annum*, and of the manor of *Normanton* held *in capite*, of the value of 18l. *per annum*, in consideration of a marriage with *M.* did covenant to stand seised of the manor of *G.* to the use of himself and the heirs males of his body, on the body of the said *M.* and after to the use of *W. B.* his brother, and the heirs males of his body, and after to the use of another brother in tail, and after to the use of his own right heirs, and of the manor of *N.* to the use of himself and *M.* he is to marry, and the heirs of his body, and after the remainders as before of the other manor; and after the marriage is had *A. B.* doth purchase other lands held in socage of the value of 3l. *per annum*, and then devised the same new purchased lands; in this case, it was adjudged that the devise was void for a third part of the socage-land, in respect of the reversion dependant upon the estate tail, and yet that it was a good devise for two parts of the new purchased land, albeit he had executed his power and given more than two parts to the use of his wife. And in these cases where a man hath land held *in capite*, and other land, and he convey the land held *in capite* to any of the uses within the statute, as to his younger children or the like, or convey it with power of revocation only, so that he hath power of the land still, and after he purchase land held in socage; in this case, it seems he may devise all the land newly purchased, as if the land were conveyed without such power of revocation. *A.* being seised of land in fee \* held of the King *in capite*, made a feoffment of two parts of it to the use of his wife for her life, for her jointure, and after made a feoffment of the third part to the use of such person or persons, and

Co. 6. 16.  
Super Lit.Co. 11. 23.  
Hen. Har-  
pur's case.

Co. 10. 83.

Co. 6. 17.  
Sir Edward  
Clere's caseCo. 10.  
Trin. 3  
Eliz. B.  
infield's  
case.Co. Rep.  
Stamf.  
Per. 8.

Plow. 485

Godolph.  
v. 17  
1182  
1182  
Nevill's case  
1182(1) By  
"in capite,  
thereof,  
in capite,  
turned into  
by the King  
tate of inh  
or in capite  
any tenure  
rary service  
by Knight's  
deems it "  
"since tha  
"them in  
"branches  
(2) But  
Bunter v. C

Co. 10. 18.  
Trin. 34.  
Eliz. Bed-  
infield's  
case.

Co. Rep.  
Stamf.  
Per. 8.

Plow. 485.

Godolphin  
v. H. 1791  
8 Term 1791  
D. 1185  
v. Jan. 182

Neville's case.

1594 to 1605

of such estate and estates as he shall limit and appoint by his last will and testament in writing; and afterwards he did by his last will in writing devise this third part to one in fee; in this case, it was resolved that the devise was good for the whole third part. And yet if a man make a feoffment in fee of land held in *capite* to the use of his last will, albeit the devise of the land be with reference to the feoffment, yet it is void for a third part. *E. B.* being seised of six manors, the one in fee, and the rest in tail with the reversion expectant to him and his heirs, and hath issue *T. B.* divers of which manors are held of the King in *capite* by Knight's service, and every of them of equal yearly value, by his last will in writing did devise all the said manors to divers persons and their heirs, for payment of his debts, and advancement of his children, and then died, and the estate in tail that descended to his issue was more than a third part of all; in this case, it was resolved that the devise was good for two parts of the reversions, and for the entire manor in possession, and not void for a third part of the manor in possession, and for all the reversions in fee. A man being seised in fee of Gavelkind land in *Kent*, part whereof is held of the King in *capite*, and part of common persons in socage, hath issue *A.* who hath issue *B. C. and D.* and he deviseth some of these lands to *B.* and some to *C.* and some to *D.* his grand children in tail; in this case, the devise is void for a third part of the whole, as well for the land held in socage, as the land held in *capite*. And yet if in this case no will be made, the King shall have but a third part of that which doth descend to the eldest son the heir at the common law, and not the third part of that which doth descend to the younger sons by custom. And if lands devisable by custom come into the King's hands, and he grant them to hold of him in *capite*, and the patentee devise them to the use of his wife, children, or for payment of his debts, &c. in this case, the devise is void for a third part (1). And here note, that in all the cases before, where a man is restrained to devise a third part of his land, if he devise the whole, the devise is good notwithstanding for so much as he hath power to devise. And as touching the thing devised, it is further to be

*See v. Rogers*  
2 Bingley 497  
5 B. & C. 720  
A died in fee of  
land with power of  
appointment to the  
other 2 devised all  
his lands to B. The  
King's Bench overruled  
the Common Pleas  
that only that only  
the moiety in fee  
helped for the waste  
could be satisfied  
without referring to  
the appointment.

known; 3. That a man must have right to and possession of the land he deviseth, or else the devise is not good. And therefore if a disseisor devise the land he hath gotten by disseisin; this devise as to the disseisee is void. And if a man be disseised of his land, so that he hath nothing but a right thereof left, and then he devise this right, or devise the land, this devise is void (2). And if one contract

Devise of a  
it may be  
a right to  
a person or  
land, or of  
reversion or  
land that is  
disseised  
another in  
interest  
man's. See v. Jones  
1 H. Bl. 38

(1) By the statute 12 Car. 2. c. 24. "for taking away the court of wards and liveries, and tenures in *capite*, and by Knight's service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof," all tenures by Knight's service of the King, or of any other person, and by Knight's service in *capite*, and by socage in *capite* of the King, and the fruit, and consequents thereof are taken away and turned into free and common socage: and it is thereby enacted, that all tenures thereafter to be created by the King, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance at the common law shall be in free and common socage, and not by Knight's service or in *capite*—but that act does not extend to take away or alter tenures in *Frank-almoign*; nor to change any tenure by copy of court roll, or any of the services incident thereunto; nor to take away the honorary services of Grant Serjeanty, other than of wardship, marriage, and other charges incident to tenure by Knight's service.—Mr. Justice Blackstone treating of this statute (in 2 vol. of his *Comm.* p. 77.) deems it "a greater acquisition to the civil property of this Kingdom than even *Magna carta* itself: since that only pruned the luxuries that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches."

*Claydon*  
act.

(2) But if the disseisee re-enters, the devise shall be good; for he was seised *ab initio*. 1 Salk. 237.—*Bunter v. Coke*, not if he makes his will while out of possession.

for



\* P. 429.

for land, and pay his money for it, but \* hath no assurance of the land, and he devise this land to another; this cannot be a good devise of the land, but ~~perhaps~~ the devisee may in a court of equity compel him that hath received the money to assure and settle the land according to the devise (1). And if one devise another man's

land, this devise is void; but if he, after the devise made, purchase this land, now is the devise good (2). If a man bargain and sell land to me on condition to re-enter, if he pay me ten pounds, and I covenant that I will not take the profits until default of payment, and he make a lease of six years of it to another, and after break the condition; in this case, I may devise this land, and the devise will be good. 14. A feignory, rent, or the like thing is de-

visable as land is, and will pass without the attornment of the tenant. The like law is of a reversion also (4). And a man may devise a rent *de novo* issuing out of land, or a rent issuing out of land that is in *esse* before. And therefore if a man make a lease for life, or years, rendering rent, the lessor may devise this rent. So if a rent be granted to one and his heirs, the grantee may devise this rent. So a man that is seised of land in fee may devise any rent out of it at his pleasure. And therefore if a man that holdeth his land by Knight's service in chief, by his will devise any rent, common, or other profit out of it; this devise is good, and that albeit the rent or profit doth amount to the value of the whole land; as if one had three acres of land worth three shillings by the year, and he devise three shillings rent out of it, this is a good devise of the whole rent; but in this case, the rent shall issue out of two parts of the land, and a third part shall be free and not charged with it, but he may charge two parts in three parts of such lands at his pleasure. And so also it is if a man have lands holden by Knight's service and not in *capite*, and other lands in *socage*, he may charge two parts of the Knight's service land, and all his *socage* land at his pleasure. And if a man have lands held in *socage*, and no lands held in *capite*, or by Knight's service, he may devise what rent he will out of it. But a man cannot devise a rent, common, or any such thing out of another man's land that is none of his own, nor out of that he hath not. And therefore if one devise 10*l.* out of his manor of *Dale*, when in truth he hath no such manor, this devise is void. If a rent be granted to me for the life of *J. S.*; it seems I may not devise this rent, but that the terre-tenant shall hold it as an occupant (3). 15. Where a man is seised of a house in fee, and may devise the house itself, there it seems he may devise the doors, windows, wainscot, or the like incidents of the house. And where a man may devise the land itself, it seems he may devise the trees or grafs growing upon the land, *quando licet id quod majus, videtur & licere id quod minus*. But where the land itself is not devisable, there such things incident or annexed to, \* or growing or being upon it, are not devisable. And therefore a tenant in tail, for life, or years, of land may not devise the

Occupant.

Devise of  
houses,  
doors, glass,  
wainscot,  
&c.

\* P. 430.

self is not devisable, there such things incident or annexed to, \* or growing or being upon it, are not devisable. And therefore a tenant in tail, for life, or years, of land may not devise the

(1) If after articles are entered into for a purchase, and before a conveyance executed, the purchaser devises the land, it shall be good in equity; for the vendor is considered as seised in trust for the purchaser, who is deemed the real owner of the land, and is therefore allowed in equity to dispose of it. *Chan. Ca. 39.*—and if the articles are entered into in the name of an agent or a trustee for the purchaser, the devise will be good, an equitable interest being as well devisable as a legal estate.—*Greenhill v. Greenhill, 2 Vern. 679.*

(2) See fully in what cases lands, acquired after the time of making the will, shall be said to pass; in *Vin. Abr. Devise (1. 4.)*

(3) See note 3 to page 104, and the several references therein.

(4) Also all contingent springing and executory uses when the person to take is certain so as that the same may be descendible are in like manner devisable per *L<sup>d</sup> Mansfield* in *Roe v. Griffiths, 136. Rep. 605.* See fully as to a devise of a possibility *Sore v. Roe, 3 D. & C. Rep. 80* *Selwyn v. Selwyn, 12 Burr. 100* *See v. Selwyn* *Shew* formerly doubted whether a possibility was devisable. *1 P. W. 463. 3 P. W. 414*

or hath not!

*See*  
*Howe v. May*  
*6th. 1800*  
This turns on the exploded notion that till break of the mortgage took no estate.

Devise of  
rent, com-  
mon, feigni-  
ory or the  
like.

J. B. 605

If a man devise  
lands mortgages to  
him in fee and after  
foreclose or purchase  
the equity of redemption  
this will not pass.  
but query of this.

8 Ver. Jan.

Attorney Gen. v. Rye

Land to two  
and the survivor  
and the heirs of  
the survivor  
cannot be devised  
during the joint  
lives.

*See v. Tomkinson*  
*2 M. & S. 165*

*See*  
*Stomms*  
*v. Dickson*  
*1 East*

Plow. 344.  
Fitz. De-  
vise 7.

Adjudged  
Powley &  
Blakeman's  
case.

Perk. fed.

538.

Lit. fed.

585, 586.

Dier 253.

140. 5. 52.

F.N.B. 121.

Co. super

Lit. 111.

8. 83. 3. 33.

6. 82.

Perk. fed.

500.

See Uses

Swin. pa

3. fed. 5

Perk. fed.

511, 515

Perk. fed.

527.

Bo. fed.

437.

Dier 272.

Plow. 520

(1) See

(2) See

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houses, or windows, doors or wainscot of houses, or trees, or grafs being or growing thereupon, but this devise is void. 16. Devise of a use.

Perk. sect. 500. Where a man hath a use that is not executed by the statute of uses, but remains at the common law, he may devise it as he may any other thing: and therefore if one be possessed of a term of years, and grant it over to another to the use of the grantor, he may dispose of this use by his will, for it is in the nature of a chattel. But if a man have such use in joint-tenancy, he cannot devise it. <sup>(2)</sup>

See Uses.

Swin. part 3. sect. 5. 17. All manner of goods and chattels real and personal may be devised by testament. And therefore leases for years of lands, grants for years of rent, common, or the like, wardships of the bodies and lands of heirs of tenants by tenure *in capite*, and by Knight's service (1), cattle, as oxen, sheep, horses, &c. gold, silver, money, plate, household stuff, as beds, pots, pans, platters, &c. corn, wool, and implements of husbandry, may be devised by will; and not only those a man hath at the time of the devise, but those a man is to have or may have afterwards. And therefore it is held, that a man may give his corn that shall grow in such a ground the next year after his death, or the wool or lambs his flock of sheep shall yield the next year after his death; and that these devises are good: but if in this case there shall be no such corn growing in that ground, or any lambs or wool arising out of his flock that year, the legacy is fruitless. And yet if the testator devise to I. S. twenty quarters of corn, or twenty lambs, and doth will that the same shall be paid out of his corn that shall grow, or out of his flock the next year, and there be not so much corn, or not so many lambs, or not any at all growing or arising, yet this is a good devise, and the things must be paid. In like manner if a man give to I. S. a horse, or a yoke of oxen; in this case, albeit the testator have neither horse nor yoke of oxen, yet the devise is good and must be performed. 18. Things in action, as debts, and the like, albeit they be not grantable by deed in the life-time of the party, yet are they devisable by will. And therefore if the testator doth by his will give any debt due to him on an obligation, or on a contract, or the like, this devise is good. And the thing devised may be had thus; the testator may, if he will, make the legatary executor as to that debt, or if he do not, the legatary may sue the executor in the spiritual court, or in some court of equity, and thereby compel the executor either to recover it himself, and so to pay it to the legatary, or to give the legatary power to sue for and recover it himself in the executor's name. But if it be such a cause of action, as is altogether uncertain, as where a man may have an action against another, for taking away his goods, or to compel him to make an account, or the like, this is such a cause of action as is not devisable. \* And yet possibilities and incertainties are in divers cases devisable. \* P. 431.

Perk. sect. 527. And therefore if one have money to be paid him on a mortgage, he may devise this money when it comes; as if I enfeoff a stranger of land, upon condition that if he do not pay me twenty pounds such a day, that I may re-enter, in this case I may devise this twenty pounds if it be paid, and the devise is good, albeit it be made before the day of payment come. And if a man be

B. o. sect. 437. Devise of debts and things in action, possibilities and incertainties.

Dier 272. Devise of goods and chattels.

Plow. 520.

(1) See the Statute 12 Car. 2. c. 24. mentioned before.

(2) A will by joint tenant of a premises so hath not the effect possessed, disposing the joint tenancy, but in the case of a copyholder joint tenant he is otherwise joined by a surrender to the use of his last will and testament, his will (by relation to the surrender whereby his estate perfect) becomes effectual and the joint tenancy is severed. See Co. Litt. 596.

charge my lands with the payment of £1000, the personalty is not liable in £1000, and charged on my lands, the personalty is liable and shall the personalty first

3 Rev. & Beames 49.  
Mortgage disqualifies  
his mortgage, money  
is said to be lent  
in the  
Devise of  
emblem-  
ments.  
which seems wrong.

Toller. 870

8 East 339 a. to  
difference in the  
subject between  
him & devisee

Devise of  
obligations.  
Counter-  
parts of  
leases, &c.

Devise of  
the things a  
man hath in  
jointure  
with ano-  
ther.

Devise of  
the things a  
man hath in  
another's  
right.

\* P. 432.

Husband  
and wife.

possessed of a term of years, and devise all the residue of that term of years that shall be to come at the time of his death; this devise is good, and yet such a grant by deed is void. But a meer possibility, and a thing altogether incertain is no more devisable by will, than it is grantable by deed. 19. Emblements, i. e. the corn that is sown and growing upon a man's ground at the time of his death, and which himself should have reaped if he had lived to the harvest, (as in most cases he shall where he doth sow it) are devisable. And therefore if a man have land in fee-simple, fee tail, for life, or years, and sow it with corn; he may devise the corn at his death to whom he pleaseth (1). And yet if lessee for years sow his land so little a while before his term expire, that it cannot be ripe before the end of the term, and he die, it seems he cannot devise this corn, for if he had lived he could not have reaped it after the end of the term. 20. Obligations, counterparts of leases, and such like things, also are devisable; but in this case, the devisee cannot sue upon the obligation in his own name, nor enter for the condition broken upon the lease if there be cause; but he may cancel, give, sell, or deliver up the obligation, or counterpart to the obligor, or lessee. And finally whatsoever shall come to the executor after the death of the testator in the right of his executorship, may be devised by the last will and testament of the testator. 21. The goods and chattels that a man hath jointly with another are not devisable. And therefore if there be two joint-tenants of goods or chattels, as where such things are given to two, or two do buy such things together, and one of them devise his part of the things to a stranger; this devise is void (2). Inasmuch that if in this case the testator make the other joint-tenant his executor, the will as to this is void, and he shall not be charged as executor for those goods, but he shall have them altogether by right of survivorship. 22. The goods and chattels that a man hath in another's right are not devisable; and therefore an executor or administrator cannot devise the goods and chattels he hath as executor or administrator, for such a devise is void. Howbeit the executor may appoint an executor of the goods of the first testator, which the administrator cannot do; and of the profits that do arise by the goods and chattels the executor or administrator hath during the time of his administration, he may make disposition. The goods and chattels belonging to colleges or hospitals may not be devised by the testaments of the masters or governors thereof; nor the goods and chattels belonging to other corporations, by the mayors, bailiffs, or heads thereof. And the goods and chattels that churchwardens have in the right of the church are not devisable. All the chattels real that a man hath in the right of his wife by her means, and all the obligations that are made to her alone before or during the time of the coverture, and the chattels real or personal that

(1) As to the doctrine of emblements, see the books referred to in the note to p. 243.—and post numb. 25.—and more fully who may devise them, in *Fin. Abr.* Devise (l. 5.)

(2) But an exception must be made of the goods and chattels of merchants or traders; for the wares, merchandizes, debts, or duties, which they have as joint-merchants, shall not survive, but shall go to the executors of the deceased, *per legem mercatoriam*, which is part of the law of this realm, for the advancement of trade and commerce, which is *pro bono publico*; for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*.—*Co. Lit.* 182. a.—See further *Fin. Abr.* Joint-tenants (B.)—*Bac. Abr.* Joint-tenants, &c. (C). *Heat. of Equity*. 63.

*Beake & Hunt*  
*Doc. & Lay & Hale & Gray & East 110*

Child's case,  
17 Ja. B. R.  
Perk. sect.  
520, 521.  
&c. See in  
Grant.

Perk. sect.  
527.

Perk. sect.  
526.  
Lit. Sect.  
287.  
Doct. &  
St. 167.

Plow. 525.  
Bro. Admi-  
nistrators 7.  
Fitz. Adm.  
3.

Doct. & St.  
lib. 2. c. 35.  
Perk. sect.  
496, 498,  
499, 560.  
Doct. & St.  
c. 7.

his

(1) A n  
fo and sur  
made any  
of his wife  
become ab  
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more fully

(2) A h  
journ  
and  
no h



his wife hath as executrix to any other, are not devisable by the testament of the husband (1). But all the chattels personal that a man hath by his wife which she hath in her own right, and the debts due upon obligations made to the husband and wife both during the coverture, are devisable by the testament of the husband.

23. Such things as are annexed, and incident to a freehold or inheritance, so that they cannot be severed from it by him that hath the property of them, as wainscot, and glass to houses, and the like, are not devisable, but in such cases where the thing itself to which it is annexed is devisable.

24. The goods and chattels that are another man's are not devisable; and therefore if a man give another man's horse, it is a void devise. So if one devise the things that by special custom of some places, as the heir-looms, do belong to the heir, this devise is void; for they are not devisable from him.

25. If a bishop have a ward belonging to his bishoprick fallen, he may devise it; but if a church of his become void in his life-time, he cannot devise the presentation. If a parson of a church have the advowson in fee, and he devise that his executors two or three of them shall present at the next avoidance; this is a good devise.

26. All these things before that are devisable, when they are devised must be named, and devised either by their proper name, or otherwise described by some other matter whereby the mind of the testator may be known and discerned; for if he err and mistake in the name or substance of the thing devised, or it be so incertainly devised and described that it cannot be perceived what he intendeth, the devise is void.

And therefore if one devise a piece of ground by the name of a Messuage, except it be so called, the devise is void. And yet by the devise of the use, profit, or occupation of land, the land itself is well devised; and by the devise of land itself, the reversion thereof may be devised.

But if one intending to devise a horse, doth devise an ox; or meaning to give gold, doth give apparel; these legacies are void, unless his meaning may appear by some circumstance to be otherwise; as if a man have but one horse, and he be called *Arundel*, and he devise his horse *Bucephal*; this legacy is good enough.

And if a man give all his money in such a chest, when in truth there is no money in that chest; or give to another the ten pounds which *I. S.* doth owe him, when in truth *I. S.* doth not owe any such money; this devise is void.

And yet if the devise be thus, *viz. I give to A. B. ten pounds and \* I will that the same be paid of the money I have in* such a chest, or of the money which such a man doth owe me; in this case the devise is good, albeit there be not any money in the chest or owing: and if one give ten pounds remaining in such a chest, whereas in truth there is but five pounds in the chest; in this case, the legacy is good for the five pounds. But error and mistake in the quantity and quality of the thing devised, when the same for the substance of it is certain, doth not hurt: and therefore, if the testator, meaning to give the fourth part of his goods, give the

Devise of things that are incident and annexed to some other thing.

Devise of things that are not the devisors, or belong not unto his executor.

Devise of a presentation to a church.

Mistake or error in the thing devised.

P. 433.

(1) A man may sell or dispose of *chattels real* which he hath in right of his wife; and if he does not do so and survives his wife, they become absolutely his own; but if he dies before his wife without having made any disposition, he cannot dispose of them by will. — *Choies in action*, which a man hath in right of his wife, he may reduce into possession by receiving or recovering them at law: and if he does so they become absolutely his own, and he may bequeath them by will; but if he dies before his wife without having received or recovered them, they shall survive to the wife. — *Co. Lit.* 300. a. — 351. — See more fully in 2 *Bl. Com.* 431. — *Bac. Abr.* Executors. (H. 4.)

(2) A husband having bequeathed to his brother when he was dead one jewel, which his wife possessed in her lifetime purchased partly with his and partly with her money they were held to be the property of the wife as her *paraphernalia*. *Northey v. Northey* 1 Atk. 77

Incertainty  
in the thing  
devised.

one half; or meaning to give but fifty pounds, give one hundred pounds; or *à converfo*, meaning to give a greater, doth give a less quantity or sum; in these cases, the legacy is good, and the legatary shall have as much as the testator did mean. If a man give his white horse, when in truth he hath but one horse and that is black; this is a good devise of this horse: and if the thing devised be under such general words that the mind of the testator cannot be known by it, the devise is void: and therefore, if the testator say, I do bequeath something, or I bequeath a substance, or I bequeath a body, or I bequeath, or the like; these devises are void for incertaintie: so if he say, I do give lands, or I do give goods; these devises are void. And yet if the testator give a horse, an ox, a gold chain, or the like, indefinitely; in these cases, the devise is good, albeit he have no such thing. But if one devise thus, I give lead, money, wheat, oil, or the like; and say not how much, or what quantity; this legacy is void for incertaintie, or at least the executor may deliver what quantity thereof he will, and this shall satisfy the legacy. 7. As touching the terms of a devise it must be known, that if one devise any thing to wicked ends, or upon wicked conditions, as to the end, that the devisee shall kill a man, or because he hath killed a man, or the like; these devises are void, in like manner as it is when the cause or motive is false; as because one is my cousin, or hath lent me money, I devise to him twenty pounds; and he is not my cousin, or did not lend me money; these devises are void. And as touching the rest of the properties of a good devise, see them before in the properties of a good testament: and here by the way, be advised if thou hast land to settle, rather to do it by act executed by advice of learned counsel in thy life and health-time, and therein add such conditions and provisos of revocation and otherwise as thou wilt; or if thou wilt do it by will, then do it in thy perfect memory and by learned advice: let the will be indented and of two parts, and leave one part with a friend, that it be not suppressed after thy death (1); let there be credible witnesses to the publication thereof, and let their names be subscribed to it: let the whole will be written with one hand and in one piece of paper or parchment, for fear of alteration, addition, or diminution: let the hand and seal of the devisor be set to it: and if it be in several parts, let his hand and seal and the hands of the witnesses be to every part; if there be any rasing or interlining, let there be a memorandum of it. And if thou make any revocation of thy will, do it by good advice and by writing; *Vox audita perit, litera scripta manet* (2).

Seventhly,  
in respect of  
the tenures  
and conditions,  
causes  
and ends of  
the devise.

A caveat  
for making  
of testaments.

\* P. 434.

8. The exposition of testaments and devises, and how they shall be construed and taken. Devises of land. First, in respect of the person that is to take by the devise; and what, when, and how he shall so take by the devise.

The general rules for the exposition of wills are these; that they must have a favourable and benign interpretation; and as near to the mind and intent of the testator as may be; and yet so withall, as his intent may stand with the rules of law, and be not repugnant thereunto. It is said to be therefore a maxim of law, *Quod ultima voluntas testatoris perimplenda est secundum veram intentionem suam*, according to these verses:

*Sed legum servanda fides; suprema voluntas  
Quod mandat fierique jubet, parere necesse est.*

(1) Where there is a duplicate of the will, and the testator cancels that part which is in his own custody, it is an effectual cancelling of the will, altho' the other part remains whole and uncanceled.—2 Perk. 742, *Onions v. Tyrer*.—1 Pr. Wms. 345. S. C.

(2) See the notes and references to 395 and 396 as to Revocations.

Terms of  
the law. tit.  
Devise.  
Co. super  
Lit. 25.  
Plow. 414.

If a devise be made of land to *I. S.* and the heirs male of his body; by this devise the sons and not the daughters of *I. S.* shall have the land. And if a devise be made of land to *I. S.* and the heirs females of his body; by this devise the daughters and not the sons of *I. S.* shall have the land. And yet it hath been said in these cases, that if, in the first case, the devisee have issue a daughter, who hath issue a son; or, in the last case, hath issue a son who hath issue a daughter; that this son and daughter shall take by this devise in these cases; but it seems the law is otherwise.

*Abraham v. Topp*  
*Co. Pl. 478*  
*as to his heirs*  
*male.*  
*Bensford's case*  
*7 Co. 42*

27 H. 8. 17.

If a devise be made of land to *I. S.* and his heirs male; by this devise *I. S.* hath an estate tail: but otherwise it is of such a limitation by deed; for if one by deed give land to another and his heirs male; by this the donee hath a fee-simple, and his heirs general shall have it.

Co. super  
Lit. 27.

If a devise be of land to *I. S.* and to the eldest heirs females of his body; by this devise all his daughters, and not one of them only, shall take it: So if one devise gavelkind-land to a man and his eldest heirs; this doth not alter the custom, but by this all the sons shall take.

*So if an estate tail*  
*in gavelkind land*  
*the youngest will take*

Fitz. Devise  
2.

If a man devise his land to his wife for life, the remainder to his son and the heirs male of his body engendred, and for default of such issue the remainder to his next heir male, and the heirs male of the body of that heir male, and after his son die without issue, (living his wife) and the devisor hath issue a daughter who hath issue a son; in this case, and by this devise, it seems the daughter, and not her son, shall have the land, and that in fee-simple.

*for the limous*  
*have failed*

Trin. 9. El.  
Adjudged  
Curteis case.

If a man devise his land to his wife for life, and after to his own right heirs male, and he hath issue three daughters, and after his death one of them hath a son; in this case, and by this devise the next collateral heir male of the devisor, and not the son of the daughter, shall have the land.

*Quares v. Fennor*  
*2 P. M. 1 the collate*  
*heir will not take*  
*D. 435.*

Dier 122.

If a man have issue two sons and a daughter, and devise his land to his wife for ten years, the remainder to his younger son and his heirs, and if either of the said two sons die without issue of their bodies, the remainder to the daughter and her heirs, and the younger son die in the life-time of the father, and after the father die; in this case, and by this devise, the daughter hath a good remainder, but it seems the elder son hath first an estate tail by the intent of the devisor.

*Lenny v. Began*  
*12 East 253.*  
*Devise to a son*  
*and the heirs of his*  
*body and if the son*  
*and daughter both die*  
*without issue then*  
*over; hold an estate*  
*tail by implication*  
*in the daughter.*

Dier 330.

If a man devise some land to *A.* his eldest daughter and her heirs, and if she die without issue, to *T.* his youngest daughter and her heirs; and if she die within sixteen years, that *A.* shall have her part to her and her heirs; and if *A.* marry such a one, that *T.* shall have her part to her and her heirs; and if *T.* die having no issue, that all her part shall go to *M.* and *E.* his nieces; and if *A.* die without issue, that *T.* shall have her part to her and her heirs; and *T.* after sixteen years, doth die without issue; in this case, the nieces *M.* and *E.* and not *A.* shall have her part that is dead.

*See also Walter v. De*  
*Wyn 71*  
*Thack v. Fennor*  
*to A. and the heirs*  
*male of his body and*  
*if he die without*  
*issue of the body to*  
*13. this will not*  
*create an estate in*  
*tail created by*  
*implication.*

Perk. sect.  
566, 567.

If land be devised to *A.* for life, the remainder to a monk for life, the remainder to *I. S.* in fee; by this devise he in the remainder in fee shall take presently after the first estate for life ended; and if the devise be to a monk for life, the remainder to *I. S.* in fee; by this *I. S.* shall take presently.

Dier 326.

If a man devise his land to a woman and her brother, and the heirs of either of their two bodies, and for default of issue of the said woman and her brother, the remainder to the right heirs of the



the devifor, and after the death of the devifor, the brother dieth without iffue, and the fiftter hath iffue and dieth; in this cafe, and by this devife, her iffue fhall have a moiety and no more of the land.

If one devife two parts of his land to his four younger fons in tail, and that if the infant in the womb of his wife be a fon, that he fhall have the fifth part as co-heir with the four, and if his five fons die without iffue, that the two parts fhall revert, and then the devifor dieth, and after a fon is born, and after he and three of the other fons die; in this cafe and by this devife, the infant fhall not take any thing, becaufe he is incapable, and the two parts fhall not revert to the heir until the five fons be dead with iffue (1).

If one devife the manor of *Dale* to the eldeft fon of *I. S.* in fee, and the manor of *Sale* to *I. D.* for life, the remainder to fuch of the children of *I. S.* as fhall be then living, and fhall have the manor of *Dale*, and the eldeft fon of *I. S.* after the teftator's death doth fell the manor of *Dale*, and after *I. D.* dieth; in \* this cafe, and by this devife, none of the children of *I. S.* fhall have the manor of *Dale*, but it fhall go to the heirs of the devifor.

• P. 436.

If one devife his land to the children of *I. S.* by this devife the children that *I. S.* hath at the time of the devife, or at the moft the children that *I. S.* hath at the time of the death of the teftator, and not any of them that fhall be born after his death, fhall take.

If one have two daughters by divers women, and devife a moiety of his land to his wife for feven years, and that the elder daughter fhall enter into the other moiety at her day of marriage, and if his wife be with child of a daughter, that then fhall have an equal portion with the other fiftter, and the devifor dieth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moiety, the younger daughter dies without iffue, and the feven years expire; in this cafe, and by this devife, the collateral heir of the younger daughter fhall have the moiety of the whole, and not the moiety of a moiety only, and that by defcent.

If a man have iffue *B. C.* and *D.* fons, and he devife his land to *D.* his fon, the remainder *proximo de fanguine*, or to the next of blood of the teftator; in this cafe and by this devife, *B.* fhall take after the death of *D.* as the next of blood. In like manner if the teftator have four daughters, and he devife his land to the youngeft in tail, the remainder to the next of blood: by this devife the eldeft daughter, and not all the reft, fhall have the land. And if the teftator have iffue *B.* his elder fon and *C.* his younger fon, and *B.* have iffue *D.* his fon, and *B.* is attainted and dieth; and the teftator devifeth his land to *I. S.* for life, the remainder to the next of blood of the teftator; by this devife *D.* and not *C.* fhall have the land.

If *A.* have iffue *B.* and *C.* fons, and *D.* a daughter, and devife his land to *C.* for life, and after that it fhall remain to the next of blood to his children, or to the next heirs of the blood of his children, and *C.* and *B.* die without iffue, and *D.* hath iffue a daughter; in this cafe, and by this devife, the heirs of *A.* fhall not take, but the next of blood to the children of *A.* which is the daughter of *D.* and his children themfelves are excluded; and

(1) See the note to page 399, and the books therein referred to, touching a devife to an infant *en ventre fœ mere*.

The devife take by defcent and the entry of the teftator is the entry of the eldest daughter into one moiety, and the entry of the eldest daughter into the other moiety is the entry of the younger daughter into the whole. Next of blood.

Adj.  
M.  
Peri.  
Pear.

Fitz. D.  
9. Perk.  
508.

See in t  
Expositi  
of Dece  
fupra.

Co. 8. 9  
Plow. 5

Melvil's  
cafe.

Fitz. De  
4. Bro.  
Done. 4

Plow. 66.

Plow. 343  
344. old M  
B. 89.  
Fitz. De  
17.

Trin. 37.  
Eliz. B. R.  
Beckford  
verfus Pa-  
riacote.

if the sons have any issues living, they shall take with her by this devise.

Adjudged  
M. 20 Jac.  
Perin versus  
Pearle. B.R.

If the testator have issue by *A.* his first wife, three daughters, *Joan*, *Elizabeth*, and *Anne*; and by *B.* his second wife, *Alice* and *Elizabeth*; and by *C.* his third wife, *William* a son, and three daughters, *Mary*, *Katherine*, and *Joan*; and he devise his land to *Joan* his youngest daughter for life, paying 13s. 4d. to the son, and after her death to the son and the heirs of his body, and after his death \* without issue to *Elizabeth* the daughter of the second wife, \* P. 437. and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the devisor for ever, and the elder *Joan* hath issue *I. P.* and dieth, the son dieth without issue; the younger *Joan* hath issue and dieth; *Elizabeth* daughter of the first wife hath issue and dieth; *Anne* dieth having issue; *Alice* dieth without issue; *Mary*, and *Elizabeth* born of the second wife, die without issue; *Katherine* dieth without issue; in this case and by this devise, the son and heir of the elder daughter after the death of the son without issue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children, shall have the land; because *proximo* in Latin doth denote a person certain; and there be exprefs devises to others: but if in this case the remainder be limited in general to the next of blood without any other matter, all the daughters perhaps may have it as joint-tenants.

Fitz. Devise  
9. Perk. sect.  
508.

If a man have two sons and a daughter which hath two daughters, and he devise his land to a stranger for life, the remainder to his second son for life, the remainder in fee to the next of blood to his son; in this case, if the eldest son die without issue, the daughter (and her daughters) shall have the land.

See in the  
Exposition  
of Deeds,  
supra.

Co. 8. 94.  
Plow. 505.

Melvil's  
case.  
Fitz. Devise  
4. Bro.  
Done. 41.

Whatsoever will pass by any words in a deed, will pass by the same words in a will, and more also; for a will is always more favourably interpreted than a deed: and therefore if a man devise the profits, use, or occupation of land; by this devise the land itself is devised.

If a man devise thus, I give all my lands to *I. S.* or I give all my tenements to *I. S.* or I give all my lands and tenements to *I. S.*; by this devise *I. S.* shall have not only all the lands whereof the devisor is sole seised, but also all the lands whereof he is seised in common or coparcenary with another; and not only the lands he hath in possession, but also the lands he hath in reversion of any estate in fee-simple; but by this devise, regularly, leases for years of lands will not pass.

Plow. 66.

If a man devise thus, I give all my land in possession only; by this devise there is given the lands he hath in possession only, and none of the lands he hath in reversion.

Plow. 343.  
344. old N.  
B. 89.  
Fitz. Devise  
17.

If a man be seised of land in fee-simple in *Dale*, and devise thus, I give all my lands in *Dale* to *I. S.* and after the will made and published, he doth purchase other lands in *Dale* and dieth; in this case and by this devise *I. S.* shall not have the new purchased lands: and in this case it hath been held further, that if the testator do by word of mouth after the purchase of the same lands declare himself to be minded that *I. S.* shall have the same new purchased lands also by this devise, that notwithstanding *I. S.* shall not have them by this devise: and yet it hath been adjudged, that if in this \* case one come to the devisor to buy his new purchased land; and he say nay, but *I. S.* shall have it as the rest; that this is a new publication of the will, and that *I. S.* by this devise shall have

E e 2

Trin. 37.  
Eliz. B. R.  
Breckford  
versus Pa-  
riacote.

See also as to what will pass under different devises  
*Cox v. Phillips* 1 S.R. *Cox v. Gell* 2 B.R. 680. *Goodright v. Harris* 11 East 380

He has just said  
the eldest daughter  
shall have the land  
but last page.

query whether  
the devise of the  
daughter will take

Secondly, in  
respect of  
the thing de-  
vised.

See in what  
cases leases for  
years will pass  
*Cox v. Bartlett*  
*Ho. Cary* 293.  
*Ray v. Feigg*  
1 P.W.  
*Addis v. Clement*  
2 P.W.  
*Davis v. Gibbs*  
3 P.W. 28.  
*Mansur for lives*  
*Sheffield v. d. Mulgrew*  
5 P.R. 577  
2 P.W. 526  
*Also on copyhold*  
*Cox v. Bell*  
5 P.R. 579.

\* P. 438. *J.*  
notionary freshet  
passing by a  
divisor's freshet  
*Cox v. Vernon* 5 East

have these new purchased lands; for a new publication of the will in these cases will make the land to pass (1). But if a man devise the manor of *Dale*, and at the time of the devise he hath it not, or devise his land in *Dale*, and at the time of the devise he hath no lands there, and afterwards he doth purchase the manor of *Dale*, or lands in *Dale*; by this devise, and in this case, the manor and the new purchased lands will pass; for in this case it shall be intended he meant to purchase it. And yet the statute enabling a man to devise lands, faith, *any person having, &c.* Co. 3. 30.

If one have an ancient tenement, and lands belonging to it, and then purchase more lands, and occupy them altogether with the tenement many years, and being all thus in his occupation, he doth make a devise after this manner, I give my tenement in *Dale*, and all my lands belonging to it now in my occupation to *I. S.* by this devise *I. S.* shall have the ancient land only, and none of the new purchased land; but if there be no ancient land belonging to the tenement, but new purchased land only, there perhaps it may be otherwise; for in this case the words cannot else be satisfied. As in case where a man hath some lands in fee-simple, and other lands for years only in *Dale*, and he devise all his lands and tenements in *Dale*; by this devise the lands he hath for years do not pass; but if he have no other lands in *Dale* but these lands, in this case perhaps this land will pass.

If one have a moiety of lands in *Essex*, and a moiety of lands in *Kent*, and he devise thus, I give my moieties, and all my other lands in *Kent* to *I. S.* it seems by this devise the moieties in both counties do pass, and that *I. S.* shall have both the moieties.

If a man be seised in fee, in possession, of the moiety of a farm called the farm of *C.* and of the reversion in fee of the other moiety, expectant on a lease made to *A.* and *B.* for their lives, and he make his will thus, I will that my wife shall have all my living which I now occupy, until my son come to twenty-one years of age; and then I will have her have the thirds of all my living, and that my son shall have all my farm of *C.* to him and his heirs; by this devise if *A.* and *B.* die before the heir be twenty-one years of age, the wife shall have the thirds of the whole farm, and not of the moiety in possession only.

If a man be seised of land in a village, and in two hamlets of the same village, and he devise all his lands in that village, and in one of the hamlets; by this devise none of his land in the other hamlet doth pass.

If a man make his will the first day of *May*, and thereby give the manor of *Dale*, to one in fee, and the tenth of *May* one of the tenancies escheat, and the twentieth of *May* the devisor dieth; in this case, and by this devise, it seems the devisee shall have the tenancy that doth escheat.

If one devise his land thus, I give my land in *Dale* to *I. S.* and his heirs, or to *I. S.* in fee, or to *I. S.* in fee-simple, or to *I. S.* for ever, or to *I. S. habendum sibi & suis*, or to *I. S.* and his assigns for ever; or thus, I give my land to *I. S.* to give, sell, or do

(1) In what cases lands acquired after the making of the will shall pass, see page 412 and the notes thereto: and further as to a new publication of the will after a new purchase, in *Com. Dig. Devise* (E. 4) *Bac. Abr. Wills, &c.* (D. 3).—4 *Burn's Ecc. Law*, 65.—*Sewinb.* 194. 516.

As to the effect of the word *Tamen* coupled with words before to help freeholds. 6 *T.R.* 345.



Kelw. 43. therewith at his pleasure; by all these, and such like devises, a  
Co. super fee simple estate is made of the thing devised, and *I. S.* shall have  
Lit. 19. the same to him and his heirs for ever.<sup>(1)</sup> But if land be granted by  
20 H. 6. 35 deed after this manner, *I. S.* by this grant in all these cases, except  
Bro. sect. only in the first case, hath only an estate for life. And if a man  
432. devise his land to *I. S.* and say not how long, nor for what time,  
19 H. 8. 10. by this devise *I. S.* hath an estate for life only in the land.  
Fitz. Devise

111. If a man devise his land to *I. S.* and his assigns, without saying  
Co. super [for ever] it is said by some, that by this devise *I. S.* hath only an  
Lit. 9. estate for life. But the contrary is affirmed elsewhere, and that it  
Perk. sect. is a fee-simple. *See Francis Porthume p. 144 Devise to A an*  
er. 230.

If one devise his land to his wife, to dispose thereof at her will and pleasure, and to give it to one of her sons; in this case, and by this devise, she hath a fee-simple; but it is qualified, for she must convey it to one of her children, and cannot convey it to another (1).

If one devise his land to *I. S.* paying ten pounds, and use no other words, by this devise the devisee hath the fee-simple of the land, albeit the ten pounds be not the hundredth part of the worth of the land (2). And yet if one devise his land to *I. S.* for his life, paying ten pounds; by this devise *I. S.* shall have an estate for life only. (3)

If one devise land of the value of fifty pounds *per annum* to *I. S.* for life, the remainder to *I. D.* paying forty pounds to *W.*; by this devise *I. D.* shall have the fee-simple of the remainder upon condition.

Hil. 17 Jac. If one have two sons, and he devise his land first to his wife,  
 B. R. ad- and then he saith thus: in like manner, I will that my son *A.* shall  
 judged Spi- have it after my wife's death; and if my wife die before my son  
 cer's case. *B.* then that my son *A.* shall pay to *B.* three pounds by the year  
 during the life of *B.* and also twenty pounds to *W. S.*; by this de-  
 vise, *A.* shall have the fee-simple of this land.

Curia M. 18. If one devise his land thus, I will my land to my son *W.* for his  
Jac. B. R. life, and after his death to my son *T.* and if my son *W.* purchase  
Green versus land as good as that land for my son *T.* then that my son *W.* shall  
Dewel. sell the land devised to my son *T.* as his own, and I will that my  
son *W.* shall pay to his sisters ten pounds by 20s. a year: in this  
case, and by this devise *W.* hath a fee-simple; for power to sell  
giveth by implication an estate in fee-simple, and it is paying  
also. &c.

Pafch. 14. If one devise land to his wife and her heirs, and if the heir put *see of the*  
 her \* out that she shall have other land: by this devise she hath \* P. 44c.  
 Curia, the fee simple of the first land, and is not abridged by the latter  
 words.

Trin. 30. If one devise his land thus, I give *White-acre* to my eldest son  
Eliz. and his heirs for his part: *Item, Black-acre* to my youngest son  
for his part; by this devise the younger son shall have the fee-simple  
of *Black-acre*: so, if I give *White-acre* to *I. S.* *Item, Black-acre*  
to *I. S.* and his heirs; by this devise *I. S.* shall have the fee-simple  
of *White-acre* also.

(1) In the case of *Thomlinson v. Dighton*, 1 Salk. 240.—H. being seized in fee, devised to his wife for her life, and then to be at her disposal to any of her children who should be then living: The court held it to be only an estate for life, with a power to dispose of the inheritance.—See the same case more fully reported in 1 Pr. Wms. 149. *Thomlinson v. Dighton* 1 Brown Mich. 26 4003.

(2) See accordingly *Wellock and Hamman's case*, 2 Leon, 114, and further: in *Vin. Abr. Devise* (S. a.)

(1) Trusts have a fee without the word 'heirs' when the purposes of the trust require it and the construction will be acely in Courts of Law Per Lord Hardwicke 1 Ves. 441. 3 Burr. 1686.

(2) Doe v. Tyldes Corp. 803 when the testator devised an estate tail charged with a life annuity.

If one give land to his wife for life, the remainder to his son and the heirs male of his body, and, for want of such issue, the remainder to the next heir male of the donor and the heirs male of his body; it seems by this devise, that the next heir male of the son hath a fee-simple (1).

Fee-tail.

If one devise his land thus, I give my land in *Dale* to *I. S.* and to his, or [to the] heirs male, or heir female of his body; [or of his body begotten] or to *I. S.* and his issues male, or his issues female; or to *I. S.* and the heirs male of his body begotten on *M.*; or to *I. S.* and *E.* his wife, and the heirs male, or heirs female of their two bodies begotten; or to *I. S.* and his heirs, if he shall have any heirs of his body, else that the land shall revert; or to *I. S.* and his heirs if he have any issue of his body; or to *I. S.* and the right heirs male of his body; or to *I. S.* and his heirs, provided that if he die without heirs of his body, that the land shall revert; by all these and such like devises an estate tail is made of the thing devised, and *I. S.* the devisee shall have the same accordingly.

Deed.

If one devise his land thus, I give my land in *Dale* to *I. S.* & *semini suo*; by this devise *I. S.* hath an estate-tail: but if he say, I give my land in *Dale* to *I. S.* *et sanguini suo*: it is said by this devise *I. S.* hath the fee-simple of the land. If one devise his land to *I. S.* *& exitibus, vel proliis de corpore suo*; by this devise if *I. S.* have no children at the time, it seems he hath an estate-tail; but by such a limitation by deed is made only an estate for life. If one devise his land thus, I give my land in *Dale* to *I. S.* for life, the remainder to *I. D.* and *E.* his wife and their children; or to *I. D.* and *E.* his wife and their men-children; or to *I. D.* and *E.* his wife and their issues; by these devises, if the husband and wife have no children at the time of the devise, is created an estate-tail; and if they have any children at the time of the devise, then hereby is created an estate for all their lives only in joint-tenancy. And if land be devised to *A.* for life, the remainder to *B.* and the heirs of his body, the remainder to *I. S.* and his wife, and after to their children; by this devise *I. S.* and his wife have estates for their lives only, and their children after them estates for their lives jointly: and albeit they have no children at the time, yet every child they shall have after, may take by way of remainder. And so also it seems is the law upon such a limitation by deed.

Deed.

\* P. 441.

Deed.

Query?

\* If lands be devised to *I. S.* and his heirs male, or his heirs female, without saying [of his body:] by this devise *I. S.* hath an estate-tail. But if such a limitation be by deed, it is a fee-simple.

If one have two sons, and devise *White-acre* to his eldest son and his heirs, and *Black-acre* to his youngest son and his heirs, and if either of them die without issue, then that the other shall be his heir; by this devise either of them hath an estate-tail, and no fee-simple.

If one have land in *Kent* in *W. S.* and *T.* and have one male child and a daughter, and his brother hath three children, *B. C.* and *D.* and he devise his land thus; Item, I give my land in *Kent* to my male child and his heirs, and if he die without heirs of his body, that the land in *W.* shall go to *B.* and his heirs. Item, I will my land in *S.* to *C.* and his heirs, and my land in

(1) See more amply what words will pass a fee, in *Com. Dig. Devise* (N. 4).—*Vin. Abr. Devise* (L. a.).—*Bac. Abr. Devises* (C.).—1 *Lik.* 436.—3 *Will.* 414, *Frogmorton* on dem. of *Wright v. Wright* and *Kearney*. Devise of all the donor's estate or all his interest in a testament to an issue; devise in fee but a devise of all lands ~~by him~~ to only give an estate T. to for life. *Croft* 660. 2 *Quint.* 1 *Lat.* 666. *Hogan v. Jackson* *Croft* 299. *Wain* and *Widue* of all his effects given a fee *Bar v. Clark* 2 *WRep.* 343 as to effects.

1 *Brook & Rygh* 72. *Hardy v. Gardner* } *Quint.* the principle  
2 *Lat.* 289. *De L. Wright* } *Wain* cases *L.P.*  
2 *J.R.* *Flitche v. Smith*

*Willmson v. Maryland* *Wain*  
*De v. Hough* 2 *WRep.* 214  
*Wain* *Wain* *Wain*

*T. to D. and his heirs; in this case, and by this devise, the male child of the devisor hath an estate tail in all the lands, and after his death without heirs (of his body), it shall remain according to the will: so that if one devise his land to his eldest son and his heirs, and if he die without heirs of his body, that it shall remain to his youngest son and his heirs; by this devise, the eldest son hath an estate tail, and the youngest son the fee-simple.*

Co. 9. 127. If one devise his land to his son *W.* and if he marry and have any issue male begotten of the body of his wife, then that issue to have it; and if he have no issue male, then to others in remainder; by this devise, it seems *W.* hath an estate-tail to him and the issue male begotten on the body of his wife.

Perk. Sec. 561. If one devise *White-acre* to *I. S.* and the heirs of his body, and then after faith thus, and I will that *I. D.* shall have *Black-acre* in the same manner that *I. S.* hath *White-acre*; by this devise *I. D.* hath an estate-tail in *Black-acre*, as *I. S.* hath in *White-acre*. *Et sic de similibus.* And if one devise *White-acre* to *I. S.* and then say; *Item, Black-acre* to *I. S.* and the heirs of his body; by this devise he hath an estate-tail in both acres.

Dier 122. If one devise his land to his wife for years, the remainder to his younger son and his heirs, and if each of his two sons die without issue, &c. that it shall remain to his daughter and her heirs, and the younger son die without issue; in the life-time of the father, and after the father dieth; it seemeth by this devise the elder son shall have the land in tail.

Adjudged Trin. 7 Jac. C. B. Robinson's case. If one devise his land to his wife for life, and after to his son, and if his son die without issue, [or having no son], then that it shall go to another; by this devise the son hath an estate-tail to him and the heirs male of his body.

Co. super Lit. 20. 26. Plow. 35. \* If lands be given to a man and woman unmarried and the heirs of their two bodies, or to the husband of *A.* and wife of *B.* and the heirs of their two bodies; by these devises are made estates in tail.

Dier 333. If a man devise *White-acre* to his three brothers, and *Black-acre* to *C.* his brother, so as he pay ten pounds to *I. S.* and otherwise that it shall remain to the house, provided that the same lands be not sold, but go unto the next of name and blood that are males, if it may be; it seems that by this devise *C.* hath an estate-tail in *Black-acre*, and that if he die without issue, it shall go to three other brothers and their heirs male in tail one after another: and that *White-acre* also is so entailed in every of their parts. For the words [shall remain to the house] shall be construed to the most worthy of the family, and the words [that are males] shall be construed in the future tense.

Adjudged 14 Eliz. C. B. and Trin. 9 Jac. B. R. If land be devised to *I. S.* and the heirs of his body, and that if he die, that it shall remain to *I. D.* by this devise *I. S.* hath an estate-tail, and the latter words do not qualify the former, but *I. D.* must attend his death without heirs of his body before he shall have the land.

Dier 171. If land be devised to *I. S.* and the heirs male of his body, and if it happen that he die without heir of his body, that it shall go to *H.* and his heirs; by this devise *I. S.* hath an estate to him and the heirs male of his body, and the subsequent words do not alter nor enlarge the estate.

Co. super Lit. 26. If land be devised to *I. S.* and *E.* his wife and to the heirs of the body of the survivor of them; by this devise the survivor shall have a general estate-tail.

*Erry v Agar*  
12 East 253

*Yet had been to the son for life only, it would still have given an estate tail.*

1 Burr. 2 Br. C. C.

2 Ves. 219 - n

*Boe v Long*

1 East 279

*Perrin v Blake*

11 Burr. 2579

*Lodding v King*

16 Ark. 224

*Boe v Wood*

1 B. L. C. 510

*Devine to A. for his heirs during their lives*

*Boe v Hurler*

5 East 15

*Boe v Alcock*

1 B. & A. 537

*Boe v Collyer*

11 East 548

*Devine to A. for life when to the and on sons in tail when to heirs male of A give, A. a return in tail male*

*Boeing without issue & without issue, given the same then to and estate*

*Boeing v Chapman*

1 P. W. 683

*Boeing v Chapman* Devine to the right heirs of her body and wife is to and person as answers the devise of *Boeing* of each, viz. a child of both and if no preceding estate be given to the party, which child takes as her share, viz. the share of the child of the first of the two. It seems pretty well settled that an estate will now be construed a fee where possible.



Deed.

If land be devised to *I. S.* and the heirs he shall have by *A.* his wife; by this devise *I. S.* hath a fee-tail, and not a fee-simple as he hath in case of such a limitation by deed.

If land be devised to *I. S.* and to the heirs of the body of such a woman begotten; by this devise *I. S.* hath an estate-tail, and begotten, shall be intended begotten by him.

If one devise land to his son and his heirs, and that if his son die within the age of twenty-one years or without issue, that the land shall remain over; and the son dieth within age having issue: in this case, and by this devise, the son hath an estate-tail, and [or] in this place shall be taken for [and].

\* If land be devised to a man and his wife, and to one heir of their body, and the heir of the body of that heir; by this devise an estate-tail is made in a will as well as in a deed.

If a man devise his land thus, I give *White-acre* to *A.* my son and his heirs, *Black-acre* to *B.* my son and his heirs, and *Green-acre* to *C.* my son and his heirs, provided that if all my said sons die without issue of their bodies, that then all my said lands shall go to *M.* my wife and her heirs; by this devise they have all of them estates in tail of their land, and as it seems cross remainders to either of them of the land of each other.

If one devise his land thus, I give my land in *Dale* to *I. S.* and if he die without issue male of his body, that then it shall remain over to *I. D.*; by this devise *I. S.* hath an estate-tail.

If a man hath issue three sons, and devise his land thus, viz. one part to two of his sons in tail, and another part to his third son in tail, and that neither of them shall sell his part, but that each of them shall be heir to the other; in this case, and by this devise, each of them hath an estate-tail, and if one of them die without issue, his part shall not revert to the eldest but shall remain to the other son, for it is an implied remainder.

If there be husband and wife, and they have issue a son and a daughter, and the husband die, and land is devised to the wife and the heirs of her late husband on her body begotten; in this case, and by this devise, the wife hath only an estate for life, the son an estate in tail, and so also the daughter in case he die without issue (1).

If one devise to *I. S.* that if he and his heirs of his body be not paid twenty pounds rent yearly, he and they shall distrain, &c. by this devise *I. S.* hath an estate-tail of this rent. But if the devise be that if *I. S.* be not paid twenty pounds yearly, he shall distrain, &c. by this devise *I. S.* hath only an estate for life. So if one devise a rent of ten pounds out of his land to be paid quarterly, and say not how long the rent shall continue; this is but an estate for life.

If one devise his land thus, I give my land in *Dale* to *I. S.* for his life, or to *I. S.* [without any more words] or to *I. S.* and his heir in the singular number, or *I. S.* and his children, and *I. S.* hath children at the time of the devise; or to *I. S.* and his successors (*I. S.* being a natural person); by all these and such like devises *I. S.* hath only an estate for life in the thing devised.

For life.

(1) See more amply what words give an estate-tail, in *Bac. Abr. Devises (D.)—Com. Dig. Devises (N. 5.)—Fin. Abr. Devises (N. 2.)—1 Aik. 429.—Eq. Ca. Abr. Devises (D.)*

\* The rule is that where the issue cannot take an estate tail but through the ancestor, the ancestor shall have an estate tail.

*Case Corbett* It was finally settled that *Devise to A for life only* if he die without issue to B gives an estate tail to A.  
1 East 229.  
*See Roe v Green* *Robinson v Robinson* *Forbuckle* 2-60  
2 Wils. 323. 1 Burr. 38.

Mich. 13  
Ja. B. R.  
Dier sect.  
307.

See before  
Lit. Bro.  
sect. 406.  
125.

Co. super  
Lit. 9. 4.

Pach. 9 J.  
Newman  
case.  
Dier 341.

Co. super  
Lit. 21.

Co. J. 66.  
Lichfield  
case.

(1) And  
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Mich. 13.  
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See before  
Lit. Bro.  
lect. 406.  
125.

But if the testator have only a term of years in the land whereof the devise is made, and devise this land to *I. S.* and doth not say for what time; it seems that by this devise the whole term is devised, unless the intent doth appear to be otherwise. And if a man devise land (whereof he is seised in fee) to *I. S.* paying ten pounds to *I. D.*; by this devise, albeit there be no estate expressed, yet *I. S.* hath a fee-simple of the land, in respect of the payment of the money. But if the intent of the testator appear to be that *I. S.* shall have the land but for his life, *contra*; for there the consideration will not alter the estate expressed upon the gift.

See page 421  
Dier v. Fyldes  
Crisp. 883

Co. super

Lit. 9. 4. 29.

assigns, [without more words] by this devise is held to be given no more but an estate for life by construction upon a will, as it is \* up- \* P. 444. on a deed. And yet in the *New Terms of the law, tit. Devise*, the contrary is affirmed (1), *Ideo quære. It is an estate for life.*

Pasch. 9 Jac.  
Newman's  
case.

Dier 341.

If one devise thus, I will that *I. S.* shall have and occupy my land in *Dale*, and say not how long; by this devise *I. S.* shall have the land for his life. But if I devise that *I. S.* shall enter into my land, and say no more; by this devise *I. S.* hath no estate at all, but power to enter into the land only.

Co. super  
Lit. 21.

If a man have a son and a daughter, and dieth, and lands are devised to the daughter, and the heirs female of the body of the father, by this devise the daughter hath only an estate for her life; for there is no such person, for she is not heir.

See  
Wills v. Palmer  
Weston v. Brimstone

Co. 1. 66.

See also  
the case  
of the  
children  
of the  
testator

If one devise his land thus, I give my land in *Dale* to *I. S.* for his life, and after to the next right heir of *I. S.* in the singular number, and to his right heirs for ever; by this devise *I. S.* hath only an estate for life. So if one devise land to *I. S.* for life, and after to the next heir male of *I. S.* and to the heirs male of the body of such next heir male; by this devise *I. S.* hath an estate for life only; but if it be thus, I give my land in *Dale* to *I. S.* for his life, and after to the heirs, or to the right heirs of *I. S.*; by this devise *I. S.* hath the fee-simple of the land; and if it be to *I. S.* for life, and after to the heirs male of *I. S.*; by this *I. S.* hath an estate tail (2).

IF

(1) And see accordingly in *Swinb.* 250.—and 4 *Burn's Ecc. Law.* 122.

(2) It hath been said to be a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his life-time or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates.—*Ferne on Cont. Rem.* 3d edition 25.—In the case of *Perrin v. Blake*, decided in *B. R. Hil. Term 10 Geo. 3.* there was the following devise. "Should my wife be enstent with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000l. &c. and if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son *John Williams*, when the said infant shall attain the age of twenty-one. Item, It is my intent and meaning that none of my children should sell or dispose of my estate for longer time than his life, and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son *John Williams* and the said infant for and during the term of their natural lives, the remainder to my brother-in-law *I. G.* and his heirs for and during the lives of my son *John Williams* and the said infant, the remainder to the heirs of the body of my said son *John Williams* and the said infant lawfully begotten or to be begotten, the remainder to my daughters, &c." No other son was born, and the question was, what estate *John Williams* took under this will? whether for life or in tail?—This case was twice solemnly argued, and the court determined that *John Williams* took only an estate for

By implication.

If one devise land to *I. S.* and *E.* his wife, and after their decease, [or the remainder] to their children; by this devise, whether they have or have not children at the time, *I. S.* and *E.* his wife have estates for their lives only. Co. 6. 166.

If one devise a moiety of his land to his wife for life, and the other moiety to his second son, and after by another clause doth devise it all to his son after the death of his wife: by this devise the son hath only an estate for life after the wife's death and no more. Curia 7 Ja. Co. B.

If one devise his land to *I. S.* in fee after the death of *I. B.* (being his son and heir apparent;) by this devise *I. B.* hath an estate for life by implication, and, until the devise take effect, the law gives it to him by descent. And so also it seems the law is where one doth devise his land to *I. S.* after the death of his wife: that by this devise the wife hath an estate for life by implication (1). And therefore if a man devise thus, I give my goods to my wife, and that, after her decease, my son and heir shall have the house where the goods are; it is held by this devise that the wife hath an estate for life in the house by implication; for a man is bound to provide for his own wife. But if a man devise his land to *I. S.* after the death of *I. W.* (a stranger to the devisor;) it seems that by this devise *I. W.* hath no estate at all by implication, and that this doth but set forth when the estate of *I. S.* shall begin, and that the intent of the testator is that his heir shall have it until that time. Bro. Devise 48. 52. Lit. sect. 107. 13 H. 7. 13. New Terms of the law. tit. Devise Plow. 158. 414. 521.

If one devise land thus, I give my land in *Dale* to *I. S.* to the intent \* that, with the profits thereof, he shall bring up a child, or to the intent, that with the profits thereof, he shall pay to *A.* ten pounds, or to the intent that he shall out of the profits thereof pay yearly ten pounds, by these devises *I. S.* hath only an estate for life, albeit the payments to be made be greater than the rent of the land: and therefore, it is not like to the case before, where a sum of money is to be paid presently. Co. 6. 16. 3. 20. Bro. Estates 78.

If *A.* devise his land thus, I give my land to *Alice* my cousin in fee-simple, after her decease to *W.* her son (who is her heir apparent); by this devise she hath an estate for life first, the remainder to her son for his life, the remainder to the heirs of *A.* in fee-simple: and so also is the law, when the devise is to any other after that manner. Dier 357.

If my father be tenant for life of land, the remainder to me in fee, and I devise this land to my wife, rendering for her natural life forty shillings to the right heir of my father; by this devise my wife hath an estate for life after the death of my father. Dier 371.

for life.—Lord Mansfield the Chief Justice, Mr. Justice Aston, and Mr. Justice Willes were of that opinion; and Mr. Justice Yates held that he took an estate tail.—From this judgment of the court of King's Bench a writ of error was brought in the Exchequer-chamber, where the decision of the court of King's Bench was reversed on the opinions of Chief Baron Parker, the Barons Perrott and Adams, and Justices Gould, Blackstone, and Nares,—against the opinions of Sir William de Grey Chief Justice of the Common Pleas, and Baron Smythe.—By this reversal the Judges appear to have been nearly equal (in number;) five being of opinion that it was an estate for life only, and seven that it was an estate-tail.—From this reversal an appeal was lodged in the House of Lords, but it was withdrawn upon a compromise.—As a similar case may frequently arise in *Willis*, it is matter of regret that the general question arising in *Perrin and Blake* was not finally decided by the appeal to the court of dernier resort.—Those who incline to think that the devisee took an estate tail may find that construction supported by a number of arguments in *Fearne's Essay on Cont. Rem.*—and for a further state of the case see 4 Burr. 2579.

(1) A devise of lands to the heir after the death of the wife, by a necessary implication, gives an estate for life to the wife, because the heir was not to take till after her death; but if the devise be to a stranger after the death of the wife, that gives no estate for life to the wife by implication; but the estate during her life shall descend, and go to the heir at law.—2 Vern. 572.—See further in *Bac. Abr. Devise* (G.)—*Com. Dig. Devise* (N. 12.)

Co. super  
Lit. 42.

Co. 10. i  
Leonard  
Lovie's ca  
87. 46.

Adjudged  
Lowen v.  
Coxe. Mic  
37. 38 El  
Co. B.  
Dier 25.  
Bro. sect.  
133.  
Lit. 283.  
Perk. sect.  
170.  
Dier 350.  
Dier 326.

Pasch. 9.  
Jac. New-  
man's case.  
Hil. 13 Ja.  
B. R. Ad-  
judged  
Blandford's  
case.

Co. 10. 46.  
Lampet's  
case.  
Perk. sect.  
558, 559.

(1) In *Bu*  
ca, which  
estate is dete  
Chan. Co.  
devise to or  
heirs male of  
Roll. Abr. tit  
on of the ter  
Rem. 342.—  
(2) See ve  
operation wh  
ery (3 V. 4.



Co. 3. 20.

If one devise his land unto his executors, until his son shall come For years. unto twenty-one years of age, the profits to be employed towards the performance of his will, and when he shall come to that age, then that his son and his heirs shall have it; by this devise the executors shall have it until he be twenty-one years of age, and if he die before that time, until the time he should have been twenty-one years of age if he had lived so long; and [shall] in this case shall be taken for [should].

Co. super Lit. 42.

If one devise his land to his executors for the payment of his debts, and until his debts be paid; by this devise the executors have but a chattel and an incertain interest, and they and their executors shall hold it until the debts be paid and no longer.

Co. 10. in Leonard Lovie's case. 87. 46.

If one devise his land to I. S. and the heirs male of his body for the term of fifty years; it seems that, by this devise, I. S. hath but a lease for so many years, if the heirs male of his body shall so long continue, and, that for want of issue male, the term of years shall end (1): and in this case, the executor or administrator, not the Executors. heirs male of I. S. shall have it after his death.

Adjudged Lowen v. Coxe. Mich. 37. 38 Eliz. Co. B. Dier 25. Bro. fecit. 133. Lit. 283. Perk. fecit. 170. Dier 350. Dier 326.

If one devise his land thus, I give to I. S. and I. D. and their heirs, my land in Dale equally; or my land in Dale to be equally divided; by these devises I. S. and I. D. shall have and hold the land, not as joint-tenants, but as tenants in common, so that the heir and not the survivor shall have his part that first dieth: And yet in case of such a limitation by deed, it is otherwise: and if one devise his land to I. S. and I. D. and their heirs [without more words]; it seems that by this devise they shall take and hold as joint-tenants. And yet if one devise land to I. S. and I. D. and the heirs of either of their bodies lawfully engendred; it seems \* that \* P. 446. by this devise I. S. and I. D. shall take and hold as tenants in common and not as joint-tenants. And so if one devise his land to I. S. and I. D. thus, I will that I. S. and I. D. shall have my lands in Dale, and occupy them indifferently to them and their heirs (2).

Pat. 9. Jac. New-man's case. Hil. 13 Ja. B. R. Adjudged Blandford's case.

If one be possessed of a term of years of land, and devise the same to his wife during all the years, and if she die within the years, then to A. and B. his two sons, if they have no issue male; but if they or either of them have issue-male, then that it shall go to the use of those issues male; and she die and the two sons die without issue born, one of their wives being privily with child of a son, which after his death is born; in this case and, by this devise, this issue male shall have it as soon as he is born.

Co. 10. 46. Lampet's case. Perk. fecit. 558, 559.

If one be possessed of a term of years, and he devise it to another and his heirs, or his heirs male; by this devise the executors or administrators, not the heirs of the legatee shall have it. And therefore, if lessee for years of land devise all his in-

(1) In *Burgis v. Burgis*, 1 Mod. 115, Lord Keeper denied the opinion of Lord Coke in *Leonard Lovie's* case, which said, that in case of a lease settled to one and the heirs male of his body, when he dies the estate is determined; for *Finch* said it should go to his executors. And in the duke of *Norfolk's* case, 9 Chan. Ca. 30. Lord *Nottingham* said, it was Lord Coke's error in *Lovie's* case to say, that if a term be devised to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body, it having been resolved otherwise in *Leventhorp* and *Abley's* case, 11 Car. B. R. *Rall. Abr.* tit. devise, fo. 611. for these words are not the limitation of the time, but an absolute disposition of the term. See accordingly and further as to the limitation of a chattel, in *Fearne on Cont. Rem.* 342. and note 5 (referred to before) to 13th edit. Co. Lit. 20. a.

(2) See very fully as to what words create a joint-tenancy or a tenancy in common, and their different operation which contained in a deed or in a will, in *Bac. Abr.* joint-tenants, &c. (F.)—*Com. Dig.* Chantery (3 V. 4.)—*Vin. Abr.* joint-tenants (G.)

terest therein to his wife if she live so long, and after her death, if any part of the term be to come, devise the same to *I. S.* his son and the heirs of his body; in this case, and by this devise, the executors and administrators of *I. S.* nor his heirs shall have it, at least, so long as he hath any heirs of his body: and yet if one possessed of a term of years, devise it to *I. S.* and after his death, that the heir of *I. S.* shall have it; in this case, *I. S.* shall have so many years of the term as he shall live, and the heir of *I. S.* and the executor of that heir shall have the residue of the term.

If one give ten pounds to the children of *I. S.* and at the time of the devise *I. S.* hath four children, and after, before the death of the testator, he happen to have two more; in this case, and by this devise, the two children he hath afterwards shall have no part of the ten pounds, but those four he had before shall have it all.

If one give ten pounds to his parish church, and, at the time of the will made, he live in one parish, and after he doth remove into another parish, and die there; by this devise the parish where he lived before, and not where he died, shall have this ten pounds.

Secondly, in respect of the things. If one devise a third part of all his goods and chattels; by this devise, some say, doth pass and is given no more but a clear third part after debts and legacies paid: but it seems a third part of the whole is hereby devised, out of which the debts must first be paid by law.

If one devise to another all his goods and chattels, or all his plate, or all of any other thing in general; by this devise doth pass and is given not only all the testator hath of that thing at the time of the making of the will, but also all he hath at the time of his death; and not only what he hath in possession, but also what he hath not in \* possession: but if one devise all his goods, or all his plate, &c. in such a place, or in the occupation of *I. S.*; by this devise none other will pass but what are in that place, or in the occupation of *I. S.*

Tithes. If one have a term of years of a portion of tithes in *Dale*, and have a term of years of land in *Dale*: and he devise all his lands and tenements in *Dale*, and all his estate therein to *I. S.*; by this devise the portion of tithes doth not pass, for it is neither land, nor tenement: but by devise of all his hereditaments, perhaps it may pass. *Sed quare.*

Goods and chattels. If one devise to *I. S.* all his goods and chattels; by this devise doth pass and is given all his estate active and passive, (except land of inheritance and freehold estates, and such things as depend thereon,) as leases for years, wardships by tenure *in capite*, or by knight's service (1), gold, silver, plate, household stuff, cattle, corn, debts, and the like; and if one devise to *I. S.* all his goods, or all his chattels, by either of these is devised as much as by both of them

Moveables. If one devise to *I. S.* all his moveables; by this devise doth pass all his personal goods, both quick and dead, which either move themselves, as horses, sheep, and the like; or may be moved by another, as plate, household-stuff, corn in the garners

(1) A guardian by Knight's service might have devised the ward of the body and land; so of a guardian in socage; but a special guardian appointed pursuant to the statute of 12 Car. 2. c. 24. cannot transfer the custody of the ward, by deed or will, to any other. *Vaugb. 179. Bac. Abr. Devises (B.)*

Agreed Hil. and barns, or in the sheaf, &c. also all bonds and especialties;  
 9. Car. C. and by a devise of immoveables do pass leases, rents, grafs, and  
 B. the like, but not any of those things that do pass by the devise of  
 moveables; but debts will not pass by either of these devises.

Swinb. 313. If one devise to another all his household-stuff; hereby do pass Household  
 part 7. c. 10. his plate, coaches, tables, stools, forms, beds, vessels of wood, stuff.

Dier 59. brass, pewter, earth, and the like; but not his apparel, books,  
 weapons, tools for artificers, cattle, victuals, corn, plow-geere,  
 and the like: by a devise of all utensils, it is agreed that plate and  
 jewels do not pass.

Swinb. 302. If a man devise to I. S. one of his horses, or a horse; by this Election.  
 devise I. S. shall have the election, if there be more than one,  
 which horse he will have: but if the devise be thus, I will that  
 my executor shall deliver to I. S. one of my horses; in this case,  
 the executor hath the election, and he may deliver which of them  
 he will.

Swinb. 94. If one devise thus, I give to I. S. my corn growing in such a  
 ground this next year; or the lambs of my flock this next year; by  
 these devises the legatee shall have no more but what doth grow  
 that year: but if he devise so many quarters of corn, or so many  
 lambs; in these cases so much must be paid howsoever.

Co. 4. 66. If one have a lease for years of land, and devise it to I. S. for Thirdly, in  
 Plow. 520. life; by this devise the whole term is devised, and I. S. the devisee respect of  
 Co. 7. 23. shall have the whole term, if he live so long; and yet I. S. shall not the time.  
 have \* an estate for life by this devise: and so also it seems the law \* P. 448.

Dier 307. is upon a grant by deed after this manner: and if a man possessed Deed.  
 of a term of years of land devise his term, or his lease, or the land  
 itself by a devise, in either of these cases the whole term doth pass.

Pasch. 14. If a man be possessed of two houses for years, and devise them  
 Jac. B. R. to his wife for her life, if she live sole; the remainder to I. S.;  
 Gough and and if she marry then that she shall have one of them during the  
 Hayward's rest of the term, [and then addeth these words,] and also, I will  
 c. 10. that she shall have twenty pounds a year out of my other lands;  
 in this case, and by this devise, it seems the annuity shall continue  
 during the term. *Sed quare*, for the judges were divided in this  
 point.

Plow. 540. If a legacy be given, and no time is set for the payment or doing  
 Swinb. 354. of it, if it be simple, it must be paid and done presently; if it be  
 conditional, and upon a condition precedent, it must be paid or  
 done at the time the condition is first extant: and if there be a time  
 set for the payment or doing of it, it must be paid or done at the  
 time appointed (1).

Co. super Devise of lands to executors to sell, to pay debts, legacies, &c. 9. Devise of  
 Lit. 236. lands to ex-  
 117, 113. ecutors or o-  
 15 H. 7. 12. are some of them after one manner, and some of them after ano-  
 Dier 177. ther; for sometimes the devise is thus, I will that my executors, lands to ex-  
 219. or that A. B. and C. my executors shall sell my land; and some-  
 Kelw. 107. times the devise is thus, I give my land to my executors to be sold, or that exe-  
 108. cutors or

(1) By the civil law, executors have a year's time, from the death of the testator, to pay legacies: and, in conformity to the civil law, the same rule hath been taken up, and is now followed, in the court of Chancery. *God. Orp. Leg. 272.*—2 *Salk. 415.* See fully at what time legacies are to be paid, and from what time they shall carry interest, in *Bac. Abr. Legacies (K).*—*Com. Dig. Chancery (3 Y. 9).*—4 *Burn's Ecc. Law, 308.*—*Eq. Ca. Abr. Legacies (D).* and (F).



others shall  
sell or other-  
wise dispose  
them: how  
this shall be  
taken, and  
what sale  
and dispositi-  
on shall be  
good or not.

or to the end that they shall sell it; in the first case, the executors have only an authority and no interest; and therefore in that case the land doth descend in the interim to the heir of the devisor, and he shall have the profits of the land until it be sold; and if it be never sold, he shall ever have the profits of it; and in this case, they may sell it when they will, if they be not hastned thereunto by order of court; and when they do sell, they must all join in the sale by the common law, or otherwise the sale had not been good; and therefore if one or more of them had died before the sale, they that had survived or their executors could never have sold it by this authority; so likewise if any of the executors had refused the charge of the will, the land could not have been sold by the rest, unless the words of the will had been that his executors or some of them should sell it; for in that case, some of them even by the common law itself might have sold, and now also by the statute of 21 H. 8, cap. 4. some of them may sell it without the rest (1): as if one give his land to A. for life, and that after his decease it shall be sold by his executors, and make four executors, and one of them die during the life of A. and then A. dieth; in this case, the other three executors may sell: so if one give his land in tail, and that if the donee die without issue, that the land shall be sold by his sons-in-law; and he hath then five sons-in-law, and one of them die in the life-time of the donee, and after the donee die without issue; in this case, the other four may sell the land, and the sale made thereof is good: and yet if the words of the will be, that it shall be sold by A. B. and C. his executors, or his sons-in-law; in this case, if one of them die, it cannot be sold by the rest: but in the last case before, where the devise is, I give my land to my executors to be sold, &c. the executors have an interest in the land, and an authority about the land also; and therefore, in this case, the descent is prevented, and the executors shall keep it till the sale; neither will any disseisin, fine, recovery, or seoffment by the heir, prejudice their interest, but that they may sell it when they will; but they must sell in time convenient, or otherwise the heir may enter and put them out by a condition in law, that is annexed to the interest; or perhaps the heir may tender to them the worth of the land, and if they refuse to accept it, he may enter upon them, and oust them: and it seems in this case, the mean profits until the sale are no assets; but the money made upon the sale shall be assets in their hand: and in this case, albeit one or more of the executors die or refuse, yet the rest may sell it, even by the common law itself, and so also by construction upon the same statute, for the estate surviveth. But it seems they may not sell to him that doth refuse; neither may they in either case transfer their power to sell to any other, nor keep the land themselves, and pay so much of their own money as the land is worth.

\* P. 449.

Assets.

(1) That excellent statute enacts, that where part of the executors named in any will, whereby lands are directed to be sold by the executors thereof, do refuse to take the administration and charge of the will, and the rest of the executors do accept and take upon them the charge of the will, that all bargain and sales of such lands so directed to be sold, made by the executors accepting, shall be as effectual as if the executors so refusing had joined.

Perk. sect.  
547.  
Dier 371.  
26.

If one devise by his will, that his land shall be sold to pay his debts, and say not by whom; in this case, it shall be sold by his executors: and if one devise all his land except one acre, which he doth appoint to pay his debts; by this devise his executors or the survivor of them may sell it: but if one say by his will, that *I. S.* shall have *tam gubernationem puerorum meorum, quam* the disposing, letting, and setting of my lands; by this devise *I. S.* hath not power given to him to sell the land.

Dier 219.

If one devise that his land shall be sold after the death of his wife by his executors with the assent of *I. S.* and make his wife and a stranger his executors and die, and after *I. S.* die; in this case, the land cannot be sold, for the authority is determined.

Dier 151.  
152.

If one devise that his executors shall sell the land, and, with the money coming or made of it, shall pay such and such legacies or sums of money in particular, to such and such persons by name; this is not a legacy for which a suit lieth in a court christian; but for this, every one that is to have portion, may have accompt against the executors after the sale.

Trin. 2 Car.  
B. R.

If one give lands to another, to give them again to the children of the testator, or to dispose them at the will of the devisees to some of the children of the deviser; in these cases, the devisees

Co. 6. 16.

\* must dispose it accordingly, and cannot give to any other: and if one gives land to others, to the intent that with the profits thereof they shall educate children, or pay such sums of money, or, &c. in this case, the devisees must do accordingly, or they may be compelled thereunto. \* P. 450.

Co. super  
Lit. 112.  
113.

And in all cases of devises of lands to executors to sell, it is wisdom to make it certain; *i. e.* that the executors or the survivor of them, or such or so many of them as take upon them the probate of the will, (if his meaning be so) shall sell it (1). And it is better to give an authority, than an estate, unless his meaning be that they shall take the profits of the land until the sale; and if he do so, then it is necessary that he appoint that the mean profits until the sale, shall be assets in their hands; for otherwise it shall not be so (2).

10. Devise upon condition, and what words in a will shall be construed in the sense of a condition, and what not.

Dier 333. 348.  
126.  
Co. super  
Lit. 236.  
See Condition.

The same words that in a deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a will, and the thing given thereby to be conditional: And therefore these words, *Provided, On condition, So that, If,* and the like, will make a condition in a will: so that if one devise

(1) In the case of *Vick v. Edwards*, 3 *Pr. Wms.* 372. *A.* devised lands to *B.* and *C.* and the survivor, in trust to sell. The estate was decreed to be sold, and it being referred to the master to see, whether the parties could make a good title, the master reported, that the parties could not make a good title, there being no fee-simple in the trustees, for that the remainder in fee could not be vested in the survivor, and it was uncertain, which of the two trustees would be the survivor.—But exceptions being taken to the master's report, the Lord Chancellor held, that the trustees joining in a fine of the premises would pass a good title to the purchaser by estoppel.—See the case and the reporter's *Quere* thereon.

(2) This subject is fully discussed by the learned editor of *Co. Lit.* in note 2 to vol. 113. a. wherein he observes, "What Lord *Coke* advances touching the effect of a will devising that executors shall sell land, is open to a variety of observations. He first supposes that such a devise passes no *interest* or estate to the executors, but merely a *power* or *authority*; and thence he infers, that, like naked authorities, it will not survive." But these positions seem at least controvertible, having been expressly contradicted by decisions since Lord *Coke's* time: and though both should be admitted to be true in point of *law*, they would not avail in a court of *equity*; as this jurisdiction, notwithstanding the extinction of the power at law, would compel its execution in favour of those, for whose benefit the power was given."—See further as to sales of land by executors, in *Vin. Abr.* Devise. (K. e.) to (S. e.)—4 *Burn's Eccl. Law*. 301.

land to *I. S.* on condition, or *So that*, or *If*, or *provided* that he do bring up his eldest son, or pay his wife twenty pounds a year for her life, or the like; by these devises, the estate is made conditional: also other words, that being used in a deed will not make a condition, yet being used in a will, make a condition, and the estate made by the devise to be conditional: and therefore, if a man devise his land to his executors to be sold; or devise his land to them, or others to pay twenty pounds to *I. S.* or paying twenty pounds to *I. S.*; in these cases, and by these devises, the estates are made conditional: and of these conditions regularly the heir, and not a stranger, shall take advantage. So as if one devise land to another, and his heirs, provided that he pay ten pounds to *I. S.* otherwise that the land shall remain to *I. D.* and his heirs; in this case, if the devisee do not pay the money, *I. D.* shall not take advantage of it, nor have the land according to the devise, but the heir of the devisor shall enter and have the land and put out the devisee. And if one devise his land to *I. S.* for life, on condition to pay twenty pounds to *I. D.* and after to *I. D.* in tail; in this case, if *I. S.* do not pay the twenty pounds, it seems the heir shall enter and hold the land during the life of *I. S.* and that *I. D.* shall not have it till then.

And in cases of devises of goods or chattels, other words will make a devise conditional in divers cases; as [when,] as, I give to *I. S.* ten pounds when he shall be married; and [whiles,] as, I give to *I. S.* twenty pounds whiles he shall abide with my children, which is as much as if he abide with my children; and [which,] as, I give him twenty pounds which shall marry my daughter; and the ablative case \* absolute, as, my son being dead, I give to *I. S.* twenty pounds. And of all these conditions, regularly, the executor and no other shall take advantage. But if the condition be such, for the matter and substance of it, as is impossible, unlawful, or the like; there perhaps these words may not make a condition, nor the thing devised conditional, but rather make the whole sentence void. Whereof read *Swinb. part. 4. sect. 5.* at large (1).

If one devise his land to his daughter and heir apparent in fee-simple, this devise is void; yet if, in this case, the wife of the devisor be privily with child of a son which is born after his death, now is the devise become good, for now she is not heir to her father.

If a woman, that hath a husband, devise her land by will during the coverture, and after her husband's death, when she is sole, she do publish and approve it; in this case, and by this means, the devise is become good: but if she make and publish it during the coverture, and after her husband die and she become sole, this accident without any more will not make the devise good: the same law is of the devise of goods and chattels.

If an infant within age devise his lands or goods and publish his will, and after he comes to be of full age, he doth publish and approve it again; in this case, and by this means, the devise is become good: but if the infant live to be of full age, and do not publish and approve it, *contra.*

(1) See further what words make a condition in a will, and as to the effect of conditions inserted in wills, in *Vin. Abr. Devise (D. c.)—Com. Dig. Devise (N. 9.)*



Swinb. 340. If a legacy of goods or chattels be given on condition to a man incapable, and, before the condition is extant, he doth become capable; in this case, and by this means, the devise is become good. See before, at *numb. 6.* more of this matter.

Lit. 168. A devise that hath a good beginning, is sometimes avoided and 12. Where  
Co. super. overthrown by subsequent matter in the same will, and sometimes a devise,  
Lit. 112. by subsequent matter in another will, and sometimes by some other good in its  
Plow. 540. accident *ex post facto*: For if a man make a subsequent or latter inception,  
541. devise, either in the same or in another will, so contrary and shall or may  
Co. 8. 94. repugnant to the former, that both cannot stand together, this by matter  
6. 33. doth overthrow the former: and therefore, if a man do give *White-acre* to *I. S.* in fee, or his white horse to *I. S.* and after, by the *ex post facto*,  
or not.

By a subsequent repugnant will.  
the same or another will, doth give *White-acre* to *I. D.* in fee, or his white horse to *I. D.* these latter devises do overthrow the former, *cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est*: and as a latter will doth overthrow the former, so the latter part of a will doth overthrow the former part of the same will: but if the devises be such as they may stand both together, and are not directly repugnant, nor do fight one against another, there the latter shall not overthrow the former, but both shall be received. As if one devise his land to *I. S.* and his heirs, and \* after by the same will devise a rent out of the same land to *I. D.* \* P. 452.  
and his heirs, or *e contra*. So if one devise *White-acre* to *A.* for life, and afterwards give the same acre to *B.* in fee; in this case, the one may have it for his life, and the other may have the fee-simple afterwards.

Plow. 545. If one devise his land to his son and heir in fee-simple; or de- By a waving  
Perk. sect. vise it to a stranger for years, the remainder to his son and heir of the estate  
569. in fee-simple; and the heir, after the death of the deviser, doth devised.  
Lit. 453. (as he may) wave the estate given him by the devise, and claim *Lit. 146 - 695*  
Kitchin 127. the land by descent; in this case, and by this means, the devise is *Antea 452*  
Dier 317. become void. But if the devise be to the son and heir in tail, the *8 Vin. 483*  
350. remainder to a stranger, there he cannot wave the devise and take it in any other manner. And so if a man have only two daughters, (who are his heir) and he devise his land to them; or have gavelkind land, and devise it to all his sons; they may not wave these devises and take by descent; for by devise they shall take as joint-tenants, who otherwise by descent shall take as parceners.

Lit. Bro. If one devise his land to another in fee-simple, fee-tail, for life, sect. 482.  
Perk. sect. or years, and the devisee after the death of the testator doth refuse 569.  
Dier 61. and wave the estate devised to him; in this case, and by this means, the devise is become void. And it seems a verbal waver is sufficient in this case. So if one give goods or chattels to another, and the devisee refuse it; by this means the devise is become void, and any waver or refusal will suffice in this case; for a man shall not be compelled *volens volens* to take a thing devised to him.

Plow. 348. If a woman sole devise her lands or goods by will, and after take a husband and die during the coverture; by this means the devise is become void. And yet if she survive her husband, and die unmarried, now is the devise become good again.

Plow. 60. If one devise his land to *I. S.* and his heirs, and afterwards *I. S.* die living the testator; by this means the devise is become void. And in this case no verbal declaration of the testator, that the heirs of *I. S.* shall have it, will help; for albeit a devise of land

F f

in

in writing may be revoked by a verbal subsequent declaration (1), or by any act crossing or controlling that devise, yet a devise becoming void by that means cannot be made good by any such verbal declaration subsequent to the same countermand. So if one give any goods or chattels to *I. S.* and he die before the testator; See infra at numb. 14. in this case, and by this means, the devise is become void, and the executor of *I. S.* shall not have it. And yet if a devise be of Perk. sect. 567, 568. land to *A.* for life, the remainder to *B.* in tail, and *A.* die before the testator; it seems the devise of the remainder doth continue good notwithstanding.

And if one devise land or goods to the wife of *I. S.* and afterwards her husband dieth, and she marry with another man, and then \* the deviser dieth; this is a good devise notwithstanding, and not avoided by either of these accidents. Plow. 344.

\* P. 453.

If one devise a term that he hath to *A.* for life, the remainder to such persons as shall be occupiers of *White-acre* at the death of *A.*; this devise, albeit in its beginning it be good, yet if the deviser die before *A.* it seems now to become void; for he that will take by way of executory devise, must take as an immediate purchasor, and be capable and known at the time of the death of the testator. Per Just. Jones M. n. Jac. Co. b.

If I give to *I. S.* twenty pounds if he marry my daughter, and she die before he marry her; in this case, and by this means, the legacy is become void. Swinb. 356

If I give a debt owing to me to *I. S.* and afterwards I receive or release the debt; hereby the devise is become void.

If a man make a will and give legacies, and appoint one or more his executor or executors, and he, or they after his death all refuse to take upon them the administration; yet in this case the legacies remain good, and are not become void: and in this case, the course is to grant the administration of the goods to him to whom it doth belong, and to annex the will to the administration, and then the administrator is to perform the will as the executor ought to do. Lit. Bro. sect. 300.

It is held also that a legacy of goods or chattels may become void by the injurious dealing of the legatee against the testator after the legacy given: whereof read *Swinb. part. 7. sect. 22.*

And when the thing devised is dead, or spoiled; howsoever by this means the devise is not become void, yet it looseth its effect, and is as if it were void. Swinb. 357. See more *supra* at numb 5.

13. Where a legacy shall go to the executor when the legatee doth die, before he doth receive it; and where not.

In all these cases when the disposition of the legacy is pure, and no time is set for the performing of it; or there is a set time for the doing of it, and the legatee die before the time; and where the disposition of the legacy is conditional, and a time set for the doing of it, if the legatee live till that time, or the condition be performed; in all these cases, the executor or administrator of the legatee shall have the legacy, and the same remedy to recover it, that the legatee himself had. But if the legatee die before the condition be performed, *contra*; And yet if in that case the testator's mind shall appear to be that the executor or administrator of the legatee shall have it; or the condition be to be performed by another, and there be no default in the legatee; or if the Swinb. 350. 355-356.

(1) But see the 6th sect. of the *stat. 29 Car. 2. c. 3.* which makes a written revocation necessary, mentioned before in the *note* to p. 395.

disposition be modal; or the legacy, that was at first upon condition, be afterwards repeated without condition; or it be referred to a condition to be afterwards set down, and none is set down; in these cases, the legacy is not lost by the death of the legatee, but shall go to his executor or administrator: as for example; If one devise twenty pounds to \* *W. S.* to be paid within four years \* P. 454. after the death of the testator, and the legatee die before the four years expired; in this case the executor or administrator after the four years shall recover the legacy. If one give to *W. S.* twenty pounds when he cometh to twenty-one years of age, and he die before he come to the age of twenty-one years; in this case his executor shall not have the legacy. But if the devise be thus, I give to *W. S.* twenty pounds, and I will that it shall be paid him at his age of twenty-one years, and he die before he come to the age of twenty-one years; in this case, his executor shall recover the legacy. So if one give to *I. S.* twenty pounds when he shall be married, and he die before marriage; in this case, his executor shall not have it. But if one devise thus, I give to *W. S.* twenty pounds towards his marriage, and he die unmarried; in this case, the executor shall have and recover the legacy. So if one do give to *W. S.* twenty pounds when the executor of the testator shall die; in this case, if *W. S.* die before the executor, the executor or administrator of *W. S.* shall not have the legacy. If one devise goods or chattels to *I. S.* and *I. S.* die before the testator, the executor or administrator of *I. S.* shall not have this legacy (1).

Plow. 519. When any chattel real or personal is given to an executor by 14. Where  
520. 543. a will, the executor hath an election given him by the law to have an executor  
Co. 10. 47. and take it in the one right or in the other, viz. as executor, or upon a de-  
2. 37. 8. 96. as legatee: and by his special entry, or seizing of the thing, or vise to him  
Dier 277. some special declaration, his election, is to be made. And if the hath an e-  
367. executor do enter generally (as most do), and never make any de- lection to  
Perk. sect. have the  
574. 573. claration which way, or by which right he will have it, (as most thing devis-  
575. executors use to do) he shall be said to have it, and the law will ed as execu-  
adjudge it in him, as executor, and not as legatee. But if by any tor, or as le-  
subsequent words or deeds he shall declare his mind to be other- gatee: and  
wise, he shall be in as a legatee *ab initio*; and yet if once he do when he  
any such act as is proper to an executor, this is a disagreement to shall have it  
the legacy *ab initio*; and after that it seems he cannot take as le- in the one  
gatee, but must take as executor. And if one executor of many, right or in  
to whom a term of years of land is devised, occupy the same alone, the other:  
and the rest intermeddle not with the profits thereof, albeit he and what  
make no declaration, it is said this is a good declaration of his act shall  
election to have it as legatee. But if a term of years be given to make a de-  
the wife of *I. S.* and *I. S.* be made executor and he enter gene- claration of  
rally, and after makes his testament and never speaks of this term; his election.  
this is no declaration of his election to have it as a legatee, nei-

(1) And if one gives a legacy to a man, his executors, administrators, and assigns; if, in such case, the legatee dies in the life-time of the testator, tho' the executors are named, yet the legacy is lost; for the words [executors, administrators, and assigns] are void, being but surplusage, *et expressio eorum &c.* and they are by supposition of law named only to take in succession, and by way of representation, as an heir represents the ancestor in case of an inheritance.—*Ellist v. Davenport*, 1 *Pr. Wms.* 84. in that case it was held that a will might be so penned, as that, tho' the legatee died in the life of the testator, yet his executors should have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the testator's intention.—See fully as to the doctrine of lapsed legacies in *Eq. Ca. Abr. Legacies (B).*—*Vin. Abr. Devise (X. c).*, &c. *Bac. Abr. Legacies (E).*—*Com. Dig. Chancery (3 Y. 13).*



ther shall the term be so deemed in him, but as executor. But in these cases this must be heeded, that howsoever the executor hath power to take as executor or as legatee, yet he cannot take as legatee to prejudice creditors in their debts; but the same things he so takes as a legacy, if there be not enough besides, shall be said to be assets in his hands, as to the creditors for the satisfaction and payment of their debts.

- \* P. 455. \* If a man devise that, after his debts and legacies paid, his wife shall have all the residue of his goods and chattels to distribute for his soul, &c. and make his wife his executor; in this case, it is said she hath no election, but she must take as executor, and cannot take as legatee. Dier 331.

15. Assent.  
*Quid.*

When a devise of goods or chattels is well made, the assent of the executor is necessary to the perfection thereof, for until then the legatee may not have or meddle with the thing devised. And Co. 13. 17. this assent is defined to be the agreement of an executor or administrator, that a legatee shall have the thing bequeathed unto him. And it is either express, *i. e.* when the executor or administrator doth by express words agree to the devise, or implied, *i. e.* when the executor doth not by words, but by some overt act, declare his assent that the legatee shall have the thing devised unto him (1).

16. Where an assent is necessary, or not: and where a man may enter into the land or take the goods or chattels devised unto him without the assent or delivery of the executor: and what shall be said a sufficient assent to execute a legacy, or not.

This agreement of the executor or administrator is not needful in the case of devise of land; for if a man be seised of land in fee-simple, and deviseth to another in fee-simple, fee-tail, for term of life, or years; in these cases, the devisee may enter into the land devised without any leave of the executor or administrator: and in truth in these cases the freehold or estate is said to be in the devisee before his entry: and therefore, if the heir enter first, the devisee may enter upon him, and put him out. And in case where land is devised by the custom of a place, if the heir enter first and keep the devisee out, the devisee may have a writ of *ex gravi querela* against him for his relief: and this writ is incident to that custom. But if a devisee enter first into the land devised unto him, and then the heir of the deviser enter upon him, then the devisee may take his remedy at the common law as in other cases. And with these things the ordinary, executor, or administrator, is not to intermeddle. But regularly a devisee cannot, nor may not, have or take any chattel real or personal devised to him, without the agreement or delivery of the executor or administrator. And by this assent, if the devise be good, (for otherwise an assent will not make it good) the devise is perfected, and the legacy executed. And yet if the legatee have the thing devised in his own hands; or if there be a special clause in the will giving him authority to take it himself; or it be a legacy to good and godly uses; or the thing given be like to perish on the ground, being corn or the like, and there

(1) Although the testator disposes of his goods or chattels, yet they all pass, not to the legatee, but to the executor, who has them in nature of a trustee for the legatee: the executor alone has a title in law to them, and the legatee cannot take any personalty bequeathed to him without the executor's assent; for, were it otherwise, it might be in the power of a legatee to subject an executor to a devastavit, which would discourage all persons from taking upon them the office of executor. *God. Orp. Leg.* 148.—*Went. Off. Ex.* 27.—The legatee may not take his legacy without the assent of the executors, or one of them, because the executors are charged to pay debts before legacies; and if one of the executors assent to pay legacies, he shall pay the value thereof out of his own purse, if there be not otherwise sufficient to pay debts, *Bac. Law Tracts* 163.

Perk. sect.  
572.

be assets besides to pay all the debts ; in these cases perhaps the assent of the executor or administrator may not be necessary, but the legatee may take the thing devised without his agreement (1). And if a legacy be given to one of the executors themselves, he may take it without any assent of his co-executors, and that before administration also if he will.

Dier 372.  
367.

If there be many executors, the assent of any one of them is sufficient \* (2) ; and if there be but one, and he be dead, the assent of his executor is sufficient : or if he die intestate, the assent of the administrator *de bonis non administratis* of the first testator is sufficient ; or the legatee himself in this case, where the executor dieth intestate, or where he doth refuse to take upon him the administration, may take administration himself, and by public declaration assent to his own legacy. And if a man be executor and legatee both, he may assent to and take the legacy, and yet waive the executorship, and this assent is good. And therefore if the legatee of a term of years be made executor, and he enter, and claim, and occupy the land by force of the devise, and die before probate of the will : the executor of the legatee, and not the ordinary, shall have this term ; and yet it seems the executor may not do this in prejudice of a creditor to hinder him of his debt. P. 456.

Co. 4. 28.

Any agreement in word or deed will suffice to make an assent and execute a devise. Let executors take heed therefore ; for if an executor do but agree that the legatee of a term of years of land shall take the profits thereof, and that but for a time only, or say to the legatee, God send you joy of it : or I intend you shall have it according to the devise, or the like ; this is a good assent to execute the legacy. A caveat for executors.

See Attorn-  
ment.Per 2 justices M. 37.  
58 El. B. R.  
Co. 4. 28.

And it seems that whatsoever verbal agreement will amount to an attornment, may make an assent to a legacy. If therefore the executor agree to the legacy upon certain terms and conditions ; this is agreed to be a good and absolute assent to the legacy (3).

Plow. 540.

If a term of years be given to the wife of the testator, during the minority of his eldest son, to the intent that she with the profits thereof shall breed up his children, the remainder of the same term to the same eldest son, and she is made executrix, and she enter generally, but doth always breed the children of the testator ; in this case, it seems that this education of the children shall be taken for an assent against her to vest the estate in the eldest son.

Plow. 516.  
Perk. sect.  
574.

And if a man possessed of a term of years give it to his wife, if she live so long, and after her decease the remainder of years to *I. S.* and make his wife executrix, and she enter, claiming to have it only for her life, the remainder to *I. S.* according to the devise ; in

Co. 8. 95. 4.  
66. 10. 47.  
Perk. sect.  
574.

this case, this is a good assent for the execution of the remnant of the term in *I. S.* And if a term be devised to *A.* for life, the remainder to *B.* and the executor assent to the devise of *A.* ; in

(1) If testator bequeath goods in the hands of *I. S.* to *I. S.* yet the property is not transferred to *I. S.* without the executor's assent, though the executor has sufficient for payment of the debts without them, and therefore executors may at the common law recover the thing or damages against the legatee, *Went. Off. Ex.* 221.—4 *Burn's Ecc. Law*, 3d edit. 301.

(2) See accordingly, *Went. Off. Ex.* 223.

(3) Accordingly, *God. Orp. Leg.* 144.

this case, this is a good assent to the devise of *B.* and shall execute the same also whether the executor have assets or not. So if a man, possessed of a term of twenty years, devise it to one for ten years, and after to another for the remnant of the term; or if the

\* P. 457. devise be to one for so \* many years of the term as he shall live, and after to another for the rest of the time: in all these cases an assent to the first devisee is an assent to the second also. And so also it seems is the law of a chattel personal, when the occupation thereof is first devised to one, and then the thing to another. And if one that hath a term of years give it to his wife for her life, the remainder to his son, and make her executrix; and she enter claiming by force of the devise, and not as executrix: in this case, this is a good assent to execute the devise to him in remainder.

If one be possessed of a term of years of land, and he devise it to one of his executors alone for part of the time, and the remainder of the time after to a stranger; and that executor alone, albeit he enter generally, doth occupy the land himself, and the other executors do not intermeddle therewith: in this case, it seems, this is a good assent to execute the legacy to him in remainder for the rest of the term. And yet if one give goods to one of his executors for life, and after to a stranger for life, and this executor alone get the goods into his own hands, and occupy them alone all his lifetime; it seems this occupation, without some assent, will not execute the gift in the second legatee.

If one possessed of a lease for years, devise it to his executors, and devise a rent out of it to *I. S.* and the executors pay the rent; this is a good assent to the whole legacy. But if he devise a rent, or common, out of it for certain years to *I. S.* and after devise the term to *I. D.*: and the executor doth agree that *I. S.* shall put in his cattle, or doth pay the rent to *I. S.* (which is a good assent to the legacy of *I. S.*;) this is no assent nor execution of the legacy of *I. D.* and yet perhaps if he devise a rent at first to *I. D.* for part of the term, and another rent to *I. S.* for the residue of the term afterwards; in this case, it seems that an assent to the first is not sufficient to perfect the devise of the second legatee. And yet if a termor devise the occupation or profits of his land to *I. S.* for ten years of his term, and after devise the land itself to *I. D.* for the rest of the term; in this case, if the executor assent to the legacy of *I. S.* this will be a good assent to and execution of the legacy of *I. D.*

If one possessed of a term devise it to *I. S.* for life, the remainder to *I. W.* and make *I. S.* his executor, and *I. S.* take a release from *I. W.* of all his right to the land; this is an implicit assent to the legacy of *I. W.*

If a man devise the occupation of a book or any other chattel personal to *I. S.* or that *I. S.* shall have the occupation of any such like thing during his life, and that after his decease it shall go to *I. D.* for ever, and the executor deliver the thing to *I. S.* it seems this is a good execution of the legacy to the second devisee

\* P. 458. *I. D.*; and \* therefore after the death of *I. S.* he may seise the goods and hold them according to the devise.

(1) See more amply as to the doctrine of assent to a legacy, by whom, and in what manner, it may be made, and in what cases it is necessary, *Vin. Abr.* Devise (A. a.) to (E. a. 3.)—*Com. Dig.* Administration (C. 5.) Chancery (3 G. 4.)—*Bac. Abr.* Legacies (L.)—Executors, &c. (L.)



Perk. sect.  
576, 577.  
578, 579.  
Co. super  
Lit. 111.

If lands or any rent, or other profit to be taken out of lands, devised to a man in fee-simple, fee-tail, for life, or years; in these cases the devisee may enter into, and have and take the thing devised, without the leave or agreement of the executor and administrator: and so he may, whether there be any executor made or not, and whether the will be proved or not, for the ordinary and the executor have nothing to do with these things. And if the devisee in any such case be disturbed in the having or taking of such things, he may have the same remedy as men have in other cases. And where the land is devised by custom, if the heir enter before the devisee, the devisee, may be relieved by a writ called *Ex gravi Querela*; but if the devisee enter first, and then the heir enter upon him, the devisee may have his remedy at the common law.

17. How a devisee may attain the thing devised: and what remedy he shall have to recover it, or damages for it.

Trin. 9 Jac.  
Lovet's  
case.  
Dier 151,  
152.

If lands are given thus, I will that my executors shall sell my land, and with the money made thereof shall pay ten pounds to my daughter *A.* and ten pounds to my daughter *B.*; in this case, and for this gift, *A.* and *B.* may either sue the executors in a court of equity, or have an action of account against them in a court of common law.

The entry is of course barred by 20 yrs by Stat. Jac. at 10 yrs after disability, when I make that when the begins to run, it runs against the demand of the Stat. 30c not time

Dier 277.

If lessee for years devise his term to executors for life, the remainder over to *I. S.* for the rest of the term: and the executor entereth and doth assent to the legacy and die, and the executor of the executor doth take the profits of the land, and keep out the second legatee; in this case, it seems he may have an account against the executor of the executor of the profits of the land. But if one devise his land to his son and his heirs (except twenty pounds a year for seven years to be employed as followeth,) and doth appoint his son (being his executor also) to pay that money to his daughters for portions; in this case, the daughters may not have an account at the common law, but they may sue the executors in the spiritual court, or in a court of equity, and if the executor be dead, they may sue his executor.

rather an action of money paid

Trin. 9 Jac.  
Lovet's  
case.

If one devise a rent out of his land, and do charge the land with a distress, the devisee may make use of that remedy and distrain for the rent: but unless power be given him by the will to distrain, he may not distrain for it.

the executors seem to have nothing to do with it.

Dier 348.

Plow. 345.

If one be possessed of a term of years of land, and devise it to his wife, to the end that she with the profits thereof shall breed up his children; in this case, this is no legacy to them, and therefore it seems they have no remedy but in chancery or some other court of equity against her, if she refuse to do it.

he may now by the Statute.

Fitz. Devise  
6.

Plow. 540.

Perk. sect.

474. 483.

20 Ed. 4. 9.

Samb. 135.

And in cases of devises of goods and chattels, as leases for years, rents out of such leases, and the like, the legatee cannot take the thing devised before he have the assent of the executor or administrator thereunto: and therefore, if in these cases the executor or administrator refuse to agree to, perform, and deliver the legacy, the legatee may sue him in the spiritual court, or in some court of equity, to compel him thereunto: but a legatee may not sue for a legacy in any of the courts of common law (1), neither may he sue the

P. 459

(1) Although the temporal courts do not directly take cognizance of legacies, so as to allow of an action for the recovery of them, yet may the executor make himself liable to an action at common law, &c. by his promise of payment, whereon an *assumpsit* will lie. *Sid. 45.*—*Sir T. Raym. 23.*—A devisee may maintain an action at the heirs of the testator.

*See Lilly v. Hill  
Cowan  
But see  
Beaks v. Shutt  
5 T.R. 696  
Ox v. Gay  
3 East 120.*

the executor or administrator in the spiritual court for the legacy, until the will be proved; but he may by suit there compel him to prove the will, or to refuse the administration: and in these courts, and by these means, the devisee may recover his legacy against an executor or administrator; if he have assets to pay the debts of the testator; for otherwise a legacy is not recoverable at all; but in case where the executor or administrator hath once agreed to the legacy, so as it is executed, it is then so vested in the legatee, and he hath such a property therein, that he may enter into, or seize and take the thing devised as his own, and if any man keep or take it from him, he may have relief as in other cases.

If another doth claim by deed of gift, the goods a legatee doth sue for; this may be tried in the ecclesiastical court.

If a debt, obligation, or any such like thing in action be devised to another, the devisee hath no means to recover it, but by a suit in the spiritual court, or in some court of equity, to compel the executor to sue for it himself, or to make the legatee a letter of attorney, to sue for it in the executor's name; for the legatee cannot sue for it in his own name, unless he be made executor as to that debt, &c. (which is the best course in these cases:) and yet if the legatee have the bond of especialty in his hands, he may deliver it up or cancel it.

If a man devise a term of years of land to *I. S.* and make another his executor, and the executor, having enough besides to pay the debts, doth sell this term; in this case, albeit the sale be good, and *I. S.* have no remedy nor means to recover the term, yet he may sue the executor for it, and recover the worth of it in damages in a court of equity (2).

And now having done with the first part of a testament, *viz.* a devise: we come to that which doth concern the second part, *viz.* an executor.

18. What person may make or appoint an executor, and what not, and how.

\* P. 460.

Any person that may make a testament, and devise his goods and chattels, may make an executor. \* And a woman that hath a husband, as to the goods and chattels she hath as executrix to another, and as to her own goods and things in action, *viz.* debts due unto her upon obligations, and specialties made to her alone before, or after her marriage, may make an executor. <sup>b</sup> And he that may make an executor, may make either one, two, three, or more his executors at his pleasure. And he may if he will make one man \* his executor for one year, and another man his executor for another year; or one man his executor until such a time, and then another his executor; as one may make *A.* and *B.* his executors, and that *B.* shall not meddle during the life of *A.* And a man may make one man executor for one part of his estate, and another man his executor for the other part of his estate; or one may make one man executor as to part of his estate, and die in-

Plow. 543.  
545. And of this opinion were Sir John Walter, and Sir John Bridgman upon deliberate advice.

See before at Numb. 4. part 1.  
a Fitz. Executor, 28.

b Swinb. 187.  
Dier 4.  
Bro. Executors 55.  
10 H. 8. 8.  
Lit. Bro. sect. 180. 3.  
H. 6. 7.  
Swinb. 200.

maintain an action at common law against a terre-tenant, for a legacy devised out of land; for where a statute, as the statute of wills, gives a right; the party by consequence, shall have an action at law to recover that right *Holt Ch. J.*—2 *Salk* 415.

(1) The cognizance of a legacy properly belongs to the spiritual court, for such bequests were not good at common law, the rule being *post mortem tunc tua non sunt*.—But this must be understood where a legacy is devised generally; but if 'tis payable out of the land or out of the profits of the land, an action of the case lies at common law, but the usual remedy is in chancery. 3 *Salk* 223.—See further in what court, and in what manner, legacies are recoverable, in *Bac. Abr. Legacies (M).*—*Com. Dig. Chancery* (3 Y. 3).—4 *Burn's Ecc. Law* 301.—*Vin. Abr. Devise (Wd).*—*Eq. Ca. Abr. Legacies (I).*

2 *P. W. 26* as to the interest which they carry.

testate,

See at numb. part 2. Numb. Swinb. Fitz. E. tors 4. Devise e Fitz. cutor Non-al 18. Br Non-al 38. d Co. e Fitz. cutor f Eitz. cutor Bro. C sultati

See be at Nur Swinb

Swinb. 223. Co. 9.

Bro. N ability Fitz. I. comm ment. Swinb. 4. & 18. 19 Dier 4 19 H. 21 H. Fitz. I. cutor Bro. E tors 9 Fitz. E tors, 121. Brief

(1) Execu (B. 2)

testate, as to the residue of his estate : also a man may appoint one to be his executor, if he will accept it ; and if he refuse, that another shall be his executor. And lastly, a man may make another his executor upon condition, *viz.* so as he give bond to such and such men to perform his will, or the like : and all these nominations and appointments of executors are good.

See at  
numb. 4.  
part 2.  
Numb. 7.  
Swinb. 222.  
Fitz. Execu-  
tors 47. 87.  
Devile 3.  
c Fitz. Exe-  
cutor 11. 88.  
Non-ability.  
18. Bro.  
Non-ability.  
38.  
d Co. 6. 67.  
e Fitz. Exe-  
cutor 24.  
f Eitz. Exe-  
cutor 24.  
Bro. Con-  
sultation.

Any person that may be a legatee, and take by the devise of goods and chattels, may be an executor: and therefore it is said, that any person or persons, male or female, of the clergy or laity, children or strangers, friends or enemies, married or unmarried, creditor or debtor, bond or free, may be an executor. <sup>c</sup> And that a bastard, an excommunicate, or an outlawed person, may be as able and absolute an executor as any other. <sup>d</sup> And an infant or child *in utero matris* may be an executor; but he cannot meddle with the administration of the goods until he be of the age of seventeen years; and therefore the ordinary must grant the administration unto some other until that time, in trust and for the benefit of the infant. <sup>e</sup> And a woman that hath a husband may be an executrix to any other person. <sup>f</sup> Also a woman may be executrix to her own husband, and the husband may be executor to his own wife, and by this means he may recover all the debts due to her upon obligations, recognizances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage: all which the husband shall not have but by executorship.

19. What person may be made or appointed an executor, and what not, and by what name.

c. 37. 56.  
d. 38. 49. 3.  
e. 21.  
Husband and wife.

See before be devisees: and yet if there be two of one name, and the testator at Numb. 7. make one of that name his executor, and doth not say, neither can Swinb. 292. it be discerned, which of them he doth intend; in this case, neither of them shall be executor.

Swinb. 222.  
223.  
Co. 9. 39.  
Bro. Non-  
ability 18.

But it is said, that an heretic, apostate, traitor, felon, recusant convict, sodomite, libeller, bastard begotten in incest, or a notorious usurer, cannot be an executor: and that if a man be for any of these causes incapable at the time of the death of the testator, when the executor is to take upon him the executorship, that he is for ever incapable: but it hath been held by the common law, that a person attaint may be an executor (1).

for ever incapable : but it hath been held by the common law, that a person attaint may be an executor (1).

\* The most apt and proper words, whereby to constitute an executor, are, I make *I. S.* my executor ; or, I make *I. S.* the executor of my will, &c. But an executor may be constituted by other words equivalent or by implication : and therefore, if a man say in his will, I will that *I. S.* shall be my general administrator, or I will that *I. S.* shall administer all my goods ; or I will that *I. S.* shall dispose all my goods and chattels ; or I commit all my goods to *I. S.* ; or I commit all my goods to the disposition of *I. S.* ; or I make *I. S.* lord of all my goods ; or I make *I. S.* legatary of all my goods ; or I leave all my goods to *I. S.* ; or I give all my goods to *I. S.* and make no other executor ; in all these cases, *I. S.* by intendment of law is made executor of all the goods and chattels of the deceased ; so if a man say, of all my goods I make *I. S.* and say no more, but omit the word [executor], by these words *I. S.*

19. What person may be made or appointed an executor, and what not, and by what name.

188. 603, enlarged  
to 21 yrs.

Husband  
and wife.

\* P. 461.  
20. By what words a man may be made an executor, and what words in a testament shall make a man full executor, or not, but a co-adjutor or supervisor; and who shall be an executor by such words.

(1) See more amply what persons may be appointed executors, in 4 *Burn's Ecc. Law* 109.—*Bac. Abr.* Executors and administrators (A).—*Vin. Abr.* Executors (H. b.) (Q. b.)—*Com. Dig.* Administration (B. 2).



of all the goods that are in his hands, by these words *I. S.* as to those goods is made executor : so if I deliver goods to *I. S.* to keep until my death, and then to distribute *ad pios usus*, or for my soul, hereby *I. S.* is made executor of those goods. So if one say, I will that *I. S.* shall be my executor, if *I. D.* will not ; by this *I. D.* is made executor in the first place by implication, and if he refuse, then *I. S.* shall be executor. But if a man make *A.* and *B.* his executors, and say, I will that *I. S.* shall be a co-adjutor, or helper to *A.* and *B.* *ad distribuendum* or *administrandum bona mea* ; or I will that *I. S.* shall be surveyor, or supervisor of my will ; in these cases, and by these words, *I. S.* is not made executor with *A.* and *B.* And yet if he say, I will that *I. S.* shall have administration of my goods ; or be executor with *A.* and *B.* ; or be administrator with *A.* and *B.* ; in these cases, and by these words, *I. S.* is made joint-executor with *A.* and *B.* And if one, supposing *I. S.* to be dead, say, I will that *I. D.* shall be my executor, because *I. S.* is dead ; in this case, and by these words, *I. S.* if he be living is made executor first ; and if he refuse, *I. D.* shall be executor : if one make *A. B.* and *C.* his executors, and then saith afterwards, and I will that *B.* shall administer my goods alone, or that *B.* only shall administer my goods ; it seems, in these cases, *B.* only is made executor, and that *A.* and *C.* are not made joint executors with him (1).

21. Where and in what case an administration is grantable, or not : and to whom it doth belong to grant it, and to whom it must be granted.

\* P. 462.

In all cases where a man hath any goods or chattels to administer, and he doth die a natural or civil death, and dieth intestate either in deed, *i. e.* doth make no will at all, nor appoint any executor ; or in law, *i. e.* that doth make one or more his executor or executors, and he or they, so appointed, is or are such persons as are not in being, or if they be in being, is or are so uncertainly named, that it cannot be discerned whom the testator doth intend ; or, if he is or they be well named, he is or they are all incapable by reason of some legal impediment ; or if otherwise they be capable, they do all die before the will be proved ; or if they live, if being cited to come in before the ordinary to prove the will, they either refuse to appear, or, if they do appear, they refuse to prove the will, and to take upon them the administration of the goods and chattels of the deceased ; in all these cases, the ordinary may and ought to grant the administration of all the goods and chattels of the deceased to him that of right it doth belong unto, according to his discretion : And if a man make a will, and, after the death of the testator, the executor prove it, and then die intestate, the ordinary must grant the administration of the goods of the first testator, not administered in the hands of the executor to some competent person or persons according to his discretion : but where a man hath no goods and chattels to administer, *i. e.* either he hath none, or, if he have they are none of his, or if they are, there is an executor named, *in rerum natura*, capable, and well named, and he doth accept, or at least hath not refused, the executorship ; in these cases, the administration ought not to be granted ; or if it be granted, it will be void or voidable at the least : and where an administration is grantable, it is to be granted by, and had from the ordinary of the diocess, where the party, whose goods are to be

(1) See further by what words, and in what manner, a man may be appointed executor, in *Went. Off. Ex. 8.*—*God. Orp. Leg. 82.*—*Bac. Abr. Executors, &c. (C. 1.)*—*Com. Dig. Administration (B. 1)* admi-

Stat. 3  
3. chap.  
21 H.  
c. 5.  
Fitz. A.  
nistrati  
Lit. Bro.  
sect. 27  
See infr  
numb.

Co. 5.  
30.  
Dier 30  
F. N. B.  
120.  
Plow. 2  
281.  
Co. 6. 1  
19.  
Dier 33  
See infr  
numb.

Dier 305

Stat. 31 Ed.  
3. c. 11. 2  
H. 8. c. 5.  
Lit. Bro.  
sect. 233.  
415.  
Fitz. Ex-  
commenge  
ment, 13.  
Co. 9. 39.  
40. 3. 40.  
Dier 339.  
4 H. 7. 14

Stat. 31 Ed. 3. chap. 11. shall have the probate of a will, in case where a man doth make a will, shall have the granting of the administration of his goods and chattels, in case he die intestate: and therefore if all the goods and chattels of the party deceased be within the same diocese wherein the intestate lived and died; the ordinary of that diocese, or his lawful deputy, or commissary, or the arch deacon of the diocese, or his deputy or official (as the custom of the country is) or the dean and chapter in time of vacation of the bishoprick, shall grant the administration, and the administration be had from him: but if there be *bona notabilia* in the case, viz. if the party deceased have goods or chattels of the value of five pounds or upwards, lying and being at the time of his decease in divers dioceses; in this case, the archbishop or metropolitan of the diocese wherein the party died, or, *sede vacante*, the dean and chapter being guardian of the spiritualities, and not the ordinary of the particular diocese, shall grant the administration; and it must be had from him; for if the ordinary of the particular diocese grant it when it ought to be granted by the metropolitan, the administration is void, not only as to the goods that lie within the other diocese, but also as to the goods lying within the same diocese: and so is it also, if it be granted by the ordinary of another particular diocese, as if *A.* die within the diocese of *Lincoln*, the King being indebted to him at the time of his death, and the administration of his goods and \* chattels is granted by the bishop of *London*; this administration is void: and if the metropolitan do grant an administration, when it ought to be granted by the ordinary of the particular diocese, the administration is voidable by sentence of the same court out of which it is granted: if one die in *Ireland*, and have nothing but an especialty for money, and that especialty doth lie in *England*, the ordinary of the diocese, within which that place is where the especialty doth lie, shall commit the administration; and if the ordinary of another diocese grant it, the administration is void: and therefore the case was, a merchant in *Ireland* was bound in an obligation of forty pounds to one *I. S.* in *London*, and the obligation was made in *Ireland*, but remained always in *London*, and the merchant died intestate in the county of *Bedford* in *England*, and a bishop of *Ireland* did commit the administration to one, and the archbishop of *Canterbury* did commit it to the wife of the intestate who had the obligation: in this case, the last administration was adjudged good: and it was there held, that the administration shall be granted by the ordinary of the place, where the especialty doth lie at the time of the death of the intestate, and not by the ordinary of the place where the debt began. And in cases where the administration is grantable by the ordinary and others as before, such persons, having power to grant it, may not grant it to whom they please; but as they are bound to grant it, and cannot refuse so to do, so are they directed and appointed to whom they shall grant it: For it is appointed by a special law, that the ordinary shall depute the next friends of the intestate to administer his goods if they desire it: and the administration is to be committed to the widow, or next of blood, or both, to the intestate; and where there be divers in equal degree, and they all sue for it, the ordinary may accept them all, or refuse some

*he may choose  
but it is usual to  
grant it to the  
widow if she applies  
for it*

Co. 5. 29.  
30.  
Dier 305.  
F. N. B.  
120.  
Plow. 277.  
281.  
Co. 6. 18.  
19.  
Dier 339.  
See infra at  
numb.

Dier 305.

Stat. 31 Ed.  
3. c. 11. 21.  
H. 8. c. 5.  
Lit. Bro.  
sect. 233.  
415.  
Fitz. Ex-  
commen-  
ment, 13.  
Co. 9. 39.  
40. 3. 40.  
Dier 339.  
4 H. 7. 14.

\* P. 463.

*Lineal descendants  
take before all others.*

some of them, and commit the administration to the rest only; and if some of them only sue for it, he may grant it to them alone: so that now the law and course is to grant the administration to the nearest of kin to the deceased; as 1. to the husband or wife; and, if there be none such, 2. to the children, sons or daughters; and if there be none such, 3. to the parents, father or mother; and if there be none such, 4. to the brothers or sisters of the whole blood; and if there be none such, 5. to the brothers or sisters of the half blood (1); and if there be none such, 6. to the next of kin, uncles, &c. And if these come in time and desire the administration, the ordinary may and must grant it to them, and cannot grant it to any other if they be capable of it, as most men are; and if divers of these in equal degree desire it, the ordinary may grant to which of them he pleaseth; howsoever, in this case, it seems most just and equal to grant it to them all, unless he have some \* special reason to admit some and exclude the rest: and if none of these that are next of kin shall desire it; but suffer the time to slip; in this case the ordinary may grant it to whatsoever stranger he please (2). And yet then perhaps the next of kin may by suit get the same administration revoked, and a new administration granted to him. See *infra* at numb. 41. (3).

\* P. 464

22. How an administration may be granted, and what shall be said a good administration, or not.

23. Who shall administer after the death of an executor or administrator, and who not; and how an executor of an executor shall charge and be charged.

An administration may and must be granted in writing under seal, for by word of mouth it may not be granted; and it may be granted as well upon condition as absolute: and it may be granted as well for a part of the estate as for the whole: and therefore, if a man have goods in two provinces, and he make a will of his goods in one of the provinces, and die intestate for the goods in the other province, an administration may be granted for the goods in this province: also an administration may be granted during, or until a certain time, or continually. And therefore, if a man make a will, and appoint an executor for seven years, after the seven years ended, the ordinary may and must grant an administration of the goods. So if one do appoint another to be his executor, a year after his death, the ordinary may and must grant the administration for that year, until the power of the executor doth take place: and all these administrations are good (4.)

If an executor die after he hath proved the will, and he hath made a testament, and appointed an executor therein; in this case, Co. 5. 9. this executor also shall be executor to the first testator, as he is Plow. 286. to the second, and he shall have all the benefit, and be subject 34 H. 6. 14. to all the charge that the first executor had and was subject a Trin. 17. unto; and yet the goods of one testator shall not be subject to Jac Co. B. the debts of the other; but each of the testator's goods shall be Wolf and Heiden's subject to the payment of his own debts only. \* And if in this case.

(1) The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half or the brother of the whole blood, at his own discretion, 2 *Black Com.* 505.—*Aleyn.* 36.—*Styl.* 74.—See also *Went. Off. Ex.* last edit. 130.—*God. Orp. Leg.* 261.

(2) Or may grant him letters *ad colligendum bona defuncti*, which neither make him executor nor administrator; his business being only to keep the goods in his safe custody, and to act for the benefit of those who are entitled to the property of the deceased, 2 *Bl. Com.* 505.

(3) See more amply what persons are intitled to take out administration, and how they are to be preferred; in, *God. Orp. Leg.* 259.—*Stat.* 22 & 23 *Car.* 2. c. 10.—29 *Car.* 2. c. 3.—*Bac. Abr.* Executors, &c. (F.)—4 *Burn's Ecc. Law* 221. 3d edit.—*Com. Dig.* Administrator (B. 6.)

(4) See further in what manner administration must be granted in *Bac. Abr.* Executors (G.)—*Com. Dig.* Administrator (B. 7)

case

Adjudge  
in Hil. 9  
Car. in d  
case.

Bro. Exe  
tor 117.  
26 H. 8.  
Co. 1. 96  
Dier 372  
Terms of  
the law,  
Admini-  
stration.

Fitz. Adm  
nistrators

Dier 160.

Lit. Bro.  
lect. 179.  
Bro. Exe-  
cutor 149.  
99.  
Fitz. Exec  
tor 12. 11  
Dier 187.



Dier 372.

Adjudged  
in Hil. 9.  
Car. in Den.  
case.

Bro. Execu-  
tor 117.  
26 H. 8. 7.  
Co. 1. 96.  
Dier 372.  
Terms of  
the law, cit.  
Admini-  
stration.

Fitz. Admi-  
nistrat. 9.

Dier 160.

Lit. Bro.  
sect. 179.  
Bro. Exe-  
cutor 149.  
99.  
Fitz. Execu-  
tor 12. 113.  
Dier 187.

case, the executor of the executor take upon him the administration of the goods of the first testator, he cannot refuse the administration of the goods of the latter: but he may take upon him the later and refuse the former. But if the executor refuse to administer to the first testator before the ordinary, or die before the probate of the will, and he hath made a testament and appointed an executor therein; in these cases, it seems the executor of the executor shall not administer the goods of the first testator, but the ordinary must grant the administration thereof: and yet if all the residue of the goods of the first testator be given by the testament to the first executor after the debts be paid; in this case, albeit he die before probate of the will, yet his executor shall be executor also to the first testator, or else he shall have the administration of his goods and chattels granted unto him: and therefore, if *A.* make his will, and give legacies to *B.* and *D.* and give all the rest of his goods and \* chattels, after debts and legacies paid, to *C.* his wife, and make her his sole executrix, and she die before probate of the will, or any election made, not knowing of the will, and *E.* sue out an administration of the goods of *A.* and pay the legacies to *B.* and *D.* and *F.* sue out an administration of the goods of *C.*; in this case, the administrator of *C.* and not of *A.* shall have the goods; for the law doth judge them in *C.* after the debts and legacies paid without any election.

\* P. 465.

If an executor, after he hath proved the testator's will, die intestate; in this case, the administration of the goods of the first testator not administered in the hands of the executor must be granted to whom the ordinary shall think fit: and if the ordinary please, he may grant the administration, *de bonis non administratis* of the first deceased, and of the goods of the second deceased, to one and the same person: and herein the administrator must take care that his administration have special words for the granting of an administration of the goods of the first testator, not administered; for howsoever some hold that, by the general administration, the administrator shall have not only the goods of the executor, but the goods of his testator also, yet it seems this is not taken to be law at this day.

If there be two executors made, and one of them doth refuse before the ordinary, and the other doth prove the will, and make a will himself and appoint an executor and then die; in this case, it seems the executor of the executor that did prove the will alone shall have the disposition of all the estate, and be executor to the first testator; and that the surviving executor shall not meddle therewith, for that his election by the death of his companion is gone. And if one make two executors, and one of them doth make an executor and die, and the other that doth survive hath accepted the executorship; in this case, the surviving executor shall have the sole disposing of the estate, and the executor of the deceased executor shall not intermeddle therewith: and if therefore the surviving executor die intestate, an administration *de bonis non administratis* of the first testator shall be granted: and if the executor of the deceased executor have any of the estate in his hands, the surviving executor may take or recover it from him: and if two be made executors, and one of them is incapable; in this case, he that is capable shall administer alone.

If

If one that is administrator of another man's goods do make his will and make an executor and die; or do die intestate; and the administration of his goods granted to somebody; in the first of these cases the executor, and in the last the administrator, unless he be made administrator of these goods also, shall not meddle with the goods of the first deceased: but the administration of the goods of the first deceased in the hands of the administrator not administered, must be granted again. And hence it is, that if the administrator of my goods have a judgment for a debt due to me, and he die before execution, and make an executor, or die intestate, that, in this case, his executor or administrator shall never have execution of this judgment. And the same law is of the administrator of my executor in this case.

24. Where an executor or administrator may accept or refuse the executorship or administration, and how: and where he may be executor after he hath refused, or not: and what act or intermeddling with the goods of the dead shall be said an administration, and what not.

An executor or administrator may accept or refuse the executorship or the administration at his pleasure; and therefore he may at any time before he hath intermeddled with the estate as executor or administrator, refuse it; and if he be sued by any as executor or administrator, he may plead, *ne unques executor, i. e.* he was never executor or administrator, and did never administer: and if it be true, he shall by this means avoid the suit; for a man shall not be compelled to take such a charge upon him whether he will or no. If therefore there be many executors, or an administration be granted unto many: and one of the executors prove the will in the name of the rest, or one accept the administration in the name of all the rest, yet the rest may refuse to accept it, and plead in any suit against them that they are not executors or administrators. But as an executor or an administrator, after he hath once legally refused the executorship or administration, can never after intermeddle therewith: so after he hath once legally accepted thereof (that is) hath done any thing as executor or administrator, and which is proper only for an executor or administrator to do, he can never after refuse it. And his acceptance of part, in this case, will make him chargeable with all, except it be in the case before, of an executor, who may accept of the last executorship, and refuse the first.

If the executors, being cited to come in and prove their will, appear before the ordinary, and refuse to administer and to prove the will, they cannot afterwards accept it or intermeddle with it. But herein this difference must be observed; that where there be many executors named and made, and, they being cited, some of them only do appear and refuse to accept it (the rest of the executors being then living) and after some or one of the rest of the executors prove the will, or take upon him the executorship; in this case, and notwithstanding this refusal, they that do refuse may afterwards at any time, at least during the life-time of their co-executors that did accept it, accept thereof, and intermeddle therewith as far forth as either of the rest. And therefore, in this case, howsoever the executors refusing shall not be charged in any suit against all the executors for any thing due from the testator, but they may by their plea avoid it; yet the executors accepting cannot sue for any thing due to the testator, nor be sued for any thing due from the testator, but they must sue and be sued in the names of themselves and their co-executors that do refuse also. And if there be three executors, and two of them prove the

See the case before.

Co. 9. 37.  
Dier 372.  
Kelw. 6.  
Bro.  
Administration 35, 3.  
Fitz. Administration 6.  
Bro. Executor 165.  
32 H. 6.  
Dier 135.

(1) See medly may  
—Gid. O.

See the cases  
before.

the will, and the third refuse; yet this third executor alone may release any debt due to the testator. But if there be but one executor made, and he alone, or if there be many made, and they do altogether refuse before the ordinary to take upon him or them the administration; in this case, the testator is so far forth said to be dead intestate; and thereupon therefore the ordinary may grant the administration of the goods of the deceased, and then the executor or executors can never after accept thereof, or intermeddle therewith. And if one or more of the executors refuse, and the rest accept, if he or they which accept die before he or they that refused accept; it seems in this case they can never afterwards accept it, but the administration must be granted.

If one be sued as executor or administrator, and he plead to the suit *ne unques executor, i. e.* he was never executor or administrator, if he have not in truth intermeddled before; this plea is a refusal of the executorship or administration, and therefore he can never afterwards accept or intermeddle with the executorship or administration.

Co. 9. 37.  
5. 34.  
Dier 105.  
Kelw. 63.  
Bro.

Administra-  
tor 35, 36.  
Fitz. Admini-  
strator 7.  
Bro. Execu-  
tor 165.  
32 H. 6. 6.  
Dier 135.

Every intermeddling with the goods of the deceased, or with the office and work of an executor, shall not be said to be such an administration as to amount unto an acceptance of the executorship or administration, and so to make a man chargeable as executor or administrator. And therefore if a man that is an executor or administrator do only lay up and preserve the goods of the deceased; or command another to take away the goods of the deceased from one that hath them in his keeping; or see the deceased buried in a decent manner, and for that purpose use, and if need be sell, some of his goods to do it; or make an inventory of the goods and chattels of the deceased; or prove the testator's will with his own money; or take his own goods lying amongst the goods of the deceased; or take and use some of the goods of the deceased only by mistake, or as a trespasser, or by the delivery of another; or take and dispose any of the goods of the deceased, when the executor or administrator doth challenge them as his own, and in his own right; or if he redeem any of the goods of the deceased with his own money when they are pledged to the full value, and the day of redemption is past; as neither of these acts will make a stranger an executor of his own wrong, so neither will they amount to an acceptance of the executorship, and make the executor or administrator chargeable as executor or administrator (1). But if a man that is an executor or administrator shall sue by that name for any debt due to the deceased; or being sued \* by that name for any debt or duty due from the deceased, shall imparl to the suit, or plead any other plea besides *ne unques executor*; or shall take into his hands the goods of the deceased, and convert them to his own use, and alter the property by sale, gift, or otherwise, and all this as the goods of the deceased; (and so it shall be intended against him if he do not declare the contrary, that he doth take and use them as his own, &c.) or if he deliver the goods of the deceased to creditors or legataries in satisfaction of their debts or legacies; or

Executor of  
his own  
wrong.

\* P. 468.

(1) See fully what act or degree of intermeddling will make any one an executor *de son tort*, what remedy may be had against him, and what acts of his shall be valid, in *Went. Off. Ex.* 172.—*Sawinb.* 337.—*G. d. Orp. Leg.* 90.—*Bac. Abr. Executors, &c.* (B. 3.) and *post* numb. 33.



receive any debt due to the deceased, and give a release for the same; or release any debt due to him before it be paid; or pay any debt due from the deceased, except it be with his own money; any or either of these acts will amount unto an acceptance of the executorship; and therefore after an executor or administrator hath done any such act, he can never after refuse the executorship or administration.

If a woman sole be made an executrix to another, and she marry a husband before she intermeddle with the estate, and then her husband doth administer; this is such an acceptance as will bind her, and she can never afterwards refuse it.

25. What things an executor or administrator shall have by virtue of his executorship or administration, and what not. First in respect of the nature of the thing.

The executor or administrator shall have by virtue of his executorship or administration all the chattels real and personal of the testator, as well those that are in possession, as leases for years of land, rent, common, or the like, grants of next advowsons, and presentations, wardships of heirs by reason of tenures *in capite*, or Knight's service, corn growing and cut, trees, and grafs cut and severed, cattle, money, plate, household-stuff, and the like; as also those that are in action, as right and interest of executions upon judgments, statutes, obligations, causes of action, and the like; he shall have also all other things that are of the nature of chattels. <sup>b</sup> And therefore the executor or administrator shall have the two years of the heir female that is in ward; a relief or an advowson that is fallen; and yet if a bishop have title to present by the vacation of a church, and then he die: in this case, the King, and not the executor or administrator of the bishop, shall present. And if the Lord have a greater estate in the feignory than for life or years, it is said the executor or administrator shall not have the relief. And the executor or administrator of the Lord shall have fines assessed upon the tenants upon their admittances in the Lord's time. <sup>c</sup> And if I make a feoffment in fee. gift in tail, or lease for life, rendering rent, and the rent is behind, and then I die; in this case, the arrearages of rent due to me in my life-time shall go to my executor or administrator in the nature of a chattel. So if a rent be granted out of land to me in fee-simple, fee-tail, for life, or years, and it be not paid to me in my life-time; these arrearages shall go to my executor, or administrator, and not to any <sup>\*</sup> other. <sup>d</sup> And so also if a parson have an annuity in fee in the right of his church, and it be behind, and the parson die; in this case, the executor or administrator, not the successor of the parson, shall have the arrearages, <sup>e</sup> And if I be seised of land and possessed of a stock of cattle, and let it to another for years, and he covenant by the lease to pay me and my wife, our heirs and assigns, one hundred pounds by the year, during the term; in this case, after my death, and my wife's surviving me, her executor or administrator, and not my heir, shall have this payment. <sup>f</sup> And if one seised of land in fee, make a feoffment of it to me, excepting the trees, and after grant me the trees for years; or if he make me a lease of the land first for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land; in both these cases, I have the trees in the nature of a chattel, and if I die my executor or administrator shall have them. <sup>g</sup> And if a man grant to me the next presentation to the church of *D.*; in this case, if I die, my executor or administrator shall have it as a chattel. <sup>h</sup> And my wife shall have so much

Bro. Executor 147.

Co. super Lit. 209. 388.

Perk. sect. 60.

Plow. 293.

Doct. & St. 39, 76.

Perk. sect. 833.

Co. 4. 65.

63. 7. 17.

Kelw. 118.

b Co. super

Lit. 209.

Dier 140.

283.

Dier 24.

Bro. Executor 143.

c Stat. 32.

H. 8. c. 37.

Co. 4. 48.

Dier 575.

d F. N. B.

120. l.

e Dier 275.

f Co. 4. 63.

g Dier 283.

34 H. 6. 27.

h See supra

at numb. 7.

of

1 Bro. tels

Plow.

Co. 3.

9. 98.

Kelw.

See b.

at Nu.

Co. 1.

Lit. 6.

740.

Fitz.

comp.

F. N.

g New

of the

tit. aff.

h Co. 1.

Lit. 40.

Co. 89.

87.

Plow.

h Lit.

470.

i M. 7.

Co. B.

Wat's

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of her wearing apparel, as is necessary and convenient for one in her estate and condition, and therefore that shall not go to my executor. But so much of her wearing apparel as she hath superfluous, and more than necessary for her, shall go to my executor or administrator after my death (1). <sup>i</sup> And the charters and evidences, that do concern any of my chattels which my executor or administrator is to have, shall go with the same chattels. So also any charters whatsoever, if they be pledged to me for money, shall go to my executor or administrator until the money be paid. But otherwise those deeds and evidences, that do belong to the heir as incident to the inheritance, shall not go to my executor or administrator after my death. But matters of trust, and such things as are personal, as offices of trust, wardships by reason of a tenure in socage, or *jure nature*, or the like, shall not go to the executor or administrator after the death of him that hath them. So an executor or administrator shall not have the grafs and trees growing on the ground, no more than the soil or ground itself whereon they grow. So an executor or administrator shall not have the incidents of a house, as glaſs, doors, wainscot, and the like, no more than the house itself; nor pales, walls, stauks, fish in ponds, deer, or conies in parks, pigeons in pigeon houses, or the like.

<sup>i</sup> Bro. Chateaux 12.

Plow. 293.  
Co. 3. 39.  
9. 99.  
Kelw. 118.  
See before  
at Numb. 7.

Co. 10. 87.  
Lit. sect.  
740.  
Fitz. Account  
compt 56.  
F.N.B. 110.

<sup>g</sup>New terms  
of the law,  
tit. assigns.  
<sup>h</sup>Co. super  
Lit. 46.  
Co. 895. 10.  
87.  
Plow. 524.  
<sup>h</sup>Lit. sect.  
470.  
<sup>i</sup>M. 7 Jac.  
Co. B.  
Wat's case.  
Lit. sect.  
739.

If a lease for years of land be granted to me and my heirs, or to me and my successors, and I die; my executor or administrator, and not my heir, shall have this term. The same law is, if a wardship, or the next advowson of a church, be granted unto me and my heirs; or if a covenant or an obligation be made to me and my heirs: for in all these cases this is still a chattel in me, that shall go to my executor or administrator, and he only shall take advantage of it. And if my heir or successor happen to get the deed, the executor or administrator may recover it from him. And if a lease be made to me for twenty years, without naming my executors or administrators or assigns in the lease; in this case, if I die, my executor or administrator notwithstanding shall have it during the term. <sup>g</sup> And if a lease for years be made to a bishop or his successors, and he die; his executor or administrator, not his heir or successor, shall have it. And if a man be possessed of a term of years of land, and grant it by deed, or give it by will, to me and my heirs, or to me and my heirs male; or devise it by will to A. for life, the remainder to me and my heirs; in these cases, I shall have these terms of years as chattels, and after my death my executor or administrator shall have them. <sup>h</sup> And if a man grant a rent out of his land to me and my heirs for twenty years, and I die; my executor or administrator, not my heir, shall have this rent. <sup>i</sup> And if a rent be granted to me, my heirs and executors, during the life of I. S. and for one

*Jones v. Magan*  
*2 Br. Ch. Cas.*  
*Elwes v. Mase*  
*5 Part 29*  
*Loftin v. Ashton*  
*3 All. 16. n. 1*  
Secondly, in  
respect of  
the case.  
*Wynn v. Hughes*  
*5 B. & C. 165*  
*Farrant v. Thoms*  
*5 B. & C. 826*  
\* P. 476.  
*Newton v. Lamb*  
*1 Br. & B. 506*  
*Buckley v. Keth*  
*5 B. & C. 54*  
*Wynne v. Biant*  
*3 B. & C. 76*  
*Thurston v. P. L. W.*  
*2 B. & C. 508*  
On the next  
*Cole v. Bellis*  
*1 P. W. 170. n.*

(1) The wife after the death of her husband shall have convenient apparel for her body, not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong.—4 *Burn's Ecc. Law* 246. which cites 1 *Roll. Abr.* 911.—*Law of Test.* 383.—*Bona paraphernalia* are not devisable by the husband from the wife, any more than heir looms from the heir; so that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee—per Lord Chancellor Macclesfield, in *Tipping v. Tipping*, 1 *Pr. Wms.* 729.—See more amply what things are included in the *bona paraphernalia*, and how far the widow is justified in retaining, or enabled to recover them, *Com. Dig.* Baron and Feme (F. 3).—*Bac. Abr.* Executors (H. 4).—2 *Black. Com.* 436.—1 *Wood* 136.—*Gid. Orp. Leg.* 130.—*Vin. Abr.* Executors (Z. 5)

half year after, and I die; in this case, the half years rent shall go to my executor or administrator, and not to my heir. And if I be seised of land in fee, and make a lease for years of it rendering rent, and then devise this rent to a stranger, and the devisee die; in this case, his executor or administrator shall have it. And if the lessee for life make a lease for years absolutely; this in law is a lease for so many years if the life so long live, and shall go to the executor or administrator after his death.

If I have a box, chest, or trunk, wherein my writings that do concern my inheritance do lie, and the same is open, and not sealed or locked: in this case my executor shall have it; but if it be locked or sealed, *contra*: for then it shall go to him that is to have the writings as incident thereunto. And yet if there be any money, plate, or any other such like thing in the chest also; my executor shall have that thing.

The incidents of a house, as glass-windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables dormant, furnaces of lead and brass, and fats in a brew and die house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house, (though fastened to no wall,) a copper, or lead fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have a lease for years of the house, and by that means hath the house also. But if the glass be from the windows, or there be wainscot loose, or doors more \* than are used that are not hanging, or the like: these things shall go to the executor or administrator.

If I make a feoffment to I. S. of land, on condition that if he pay me, my heirs or assigns, or my heirs, executors or administrators, a hundred pounds such a day, that the feoffment shall be void, and I die before the time of payment; in this case, if this money be paid at the day, my executor or administrator, and not my heir, shall have it.

If one be seised in fee of lands whereon there are trees growing, and he make a feoffment of the land to me, excepting the trees, and afterwards he doth sell me the trees for ever, and after I die; in this case, my executor or administrator shall not have these trees, as they shall in case where the feoffor doth grant them to me for years. And if I be seised of land in fee, and I make a lease for life, or years of it, excepting the trees, and afterwards I die; in this case, my executor or administrator shall not have these trees, but they shall go in both cases with the land.

If a lease be made for life, or years, of land, whereon a house is standing, or timber is growing, and the house is prostrate, or the timber is cut or fallen down (by whomsoever or what means soever it be;) the materials of this house, and this timber, is now become a chattel; and therefore, if the lease be without impeachment of waste, it shall go to the lessee, and after his death to his executor or administrator; but if the lease be otherwise, it shall go to the lessor, and after his death to his executor or administrator. But if the timber be cut for reparations only, or the lessee will employ the materials of the house to build it again, and the lease do continue, it may be so employed, and then the executor or administrator of the lessor may not take it.

If

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Fitz. Cov  
nants 17-  
Dier 24.(1) See  
thereunto



Co. 11. 50. If one be seised in fee-simple of ground whereon trees do grow,  
Perk. sect. and he sell me these trees for money, and afterwards I die before  
58. they be cut; in this case, my executor or administrator shall have  
and may cut them.

Co. super If the King's tenant by Knight's service *in capite* be seised of a  
Lit. 388. manor whereunto an advowson is appendant, and the church be-  
come void, and the tenant dieth, his heir within age; in this case,  
the King, and not the executor or administrator of the tenant, shall  
have the presentation. And yet if in this case the land be held of  
a common person, the executor or administrator, and not the guar-  
dian, shall have it.

Dier 316. In all cases regularly where a man doth sow land, whereof and  
Doct. & St. wherein he hath such an estate as may perhaps continue until the  
35. corn be ripe, if he that doth sow it die before it be cut and severed,  
Perk. sect. his executor or administrator shall have it: as if the husband sow  
59. the land whereof he hath an estate in fee-simple, fee-tail, for life,  
\* or for a certain number of years, in the right of his wife, and  
die 'ere it be ripe; in this case, the executor or administrator of  
the husband, and not the wife, shall have it. And if one that  
holdeth land for the life of *I. S.* sow the land, and *I. S.* die 'ere it  
be ripe and cut; the executor or administrator of the tenant shall  
have this corn. And if tenant in tail, or in dower, sow the land  
they do so hold, and die ere it be cut; the executor or adminis-  
trator, not the issue in tail, nor the heir, or him in reversion, shall  
have it. So if the husband make a feoffment in fee to the use of  
himself for life, and after of his wife, &c. and he sow the land,  
and after die; his executor or administrator, not his wife, shall  
have the corn. But if a feoffment be made to the use of the hus-  
band and wife together in fee, or for life, and the husband sow the  
land; in this case the wife, not the executor or administrator of the  
husband, shall have the corn. So if lessee for years certain sow the  
land a little before the end of his term, and the term end before it be  
cut; in this case, he that is to have the land, not the executor or  
administrator of the lessee for years, shall have the corn (1).

*The husband and wife take by  
coverture and then  
in the husband's  
death the wife has  
the land. But if  
it would be different  
if the feoffment was  
made before marriage  
for then in his death  
his executor would  
have the corn.  
So if the grantee  
of the seignory*

Co. 2. 93. If there be tenant for life, the remainder in fee of a tenancy, and  
the Lord grant his seignory for life, and after he in remainder in  
fee of the tenancy die, his heir within age, and after the Lord die,  
and after the tenant for life die; in this case, the heir, and not the  
executor or administrator of the Lord, shall have the wardship.

*tail of the tenancy*

Hil. 7 Jac. If one be seised of land in fee, and make a lease for years ren-  
B. R. per dering rent at *Michaelmas*, or within ten days after, and the lessor  
Curiam. happen to die during the term after *Michaelmas*, and before the  
ten days expired; in this case, the heir of the lessor, and not his  
executor or administrator, shall have the last half year's rent due at  
*Michaelmas*.

F.N.B. 120. If one grant a rent in fee, and grant withal that, if the rent be  
Fitz. Cove- behind, the grantor shall forfeit twenty shillings *nomine pene* to the  
nants 17. grantee and his heirs, and the rent is behind, and the grantee die;  
Dier 24. in this case, his executor or administrator, not his heir, shall have  
this money that is forfeit already. So if one make a feoffment in  
fee of land, and the feoffee doth covenant to do divers things to  
the feoffor, *et quoties defectus fuerit*, &c. that he shall forfeit to

(1) See before, as to the doctrine of emblements, in fo. 243 & 414, and the references in the notes  
thereunto respectively.

him and his heirs five pounds, and the feoffee doth fail and break his covenant divers ways, and the feoffor dieth; in this case, his executor or administrator, not his heir, shall have and recover all the forfeitures that are past.

If a Bishop, Parson, Vicar, Master of an hospital, or any body politic be possessed of any goods or chattels in their own right and die; these shall go to the executor or administrator, and not to the successor, of such a person. And albeit such things be granted to \* them and their successors, yet their executors and administrators, and not their successors, shall have it. But if a corporation aggregate, as Dean and Chapter, Mayor or commonalty and the like, have any goods or chattels in right of their corporation, and any of the heads or members thereof die; the executors or administrators of such person shall not have them: but they shall continue in succession with the corporation.

\* P. 473.

*Richard v. Harris  
Co. 6. 80.  
Dier 201.  
The person seized  
of the inheritance  
of the deceased  
leaves a Husband  
and wife,  
the devise will  
have the real  
possession, as  
well as the others.*

An executor or administrator shall have the benefit of a pardon granted to the deceased, and shall have advantage of any error in any outlawry against the deceased, and have restitution of the goods forfeit thereupon.

The executor or administrator of a woman that hath a husband, shall have, by right of his executorship or administration, all actions, rights, and titles, to any chattels, and possibilities, and things of that nature, which the wife had before the marriage, and which fell to her during the marriage; for these things the husband shall not have by the intermarriage after his wife's death, as he shall have all the rest of her goods and chattels: except he have them as executor or administrator to her, as he may be. And if such a woman have any goods or chattels as executrix to another, her executor or administrator, not her husband, shall have these also; for she hath these goods in another's, and not in her own right.

If I have any goods or chattels in joint-tenancy with another, as if a lease be made of lands to me and another for years, or a horse or other chattel personal be given or granted to me and another; in these cases, if I die, my executor or administrator shall not have any part of these goods or chattels; but the other surviving joint-tenant shall have them all. But otherwise it is of the goods and chattels that I and another have in common. And therefore if I and another have goods and chattels in that nature as before; and he, or I, grant that which doth belong unto us thereof unto a stranger; in this case, the stranger, and him of us two that hath kept his part, are tenants in common of the things; and therefore, if either of us die, the part of him that dieth in the goods and chattels shall go to his executor or administrator, and not to the other tenant in common.

If I have a judgment for land in a real or mixt action, and for damages recovered in the same suit, and I die; in this case, my executor or administrator, not my heir, shall sue execution for and recover the damages, but not for the land. So if I recover damages against another for the detaining of my charters, and die; my executor or administrator shall recover the damages, but the heir shall have the charters; and the heir must sue his *scire facias* for the charters, 'ere the executor can sue for the damages. Also if I recover any debt or damage in any personal action; my executor

Co. 4. 65.  
Perk. sect.  
58.  
Co. super  
Lit. 46.

Co. 6. 80.  
Dier 201.

Co. super  
Lit. 351.  
Plow. 294.  
192.

Lit. sect.  
281.  
Perk. sect.  
125. 526.  
Lit. sect.  
320. 321.

Fitz. Execu-  
tor 53. 84.  
117.

Hil.  
Co. 3.  
Hen.  
case.  
Jac.  
Davi.  
Hil.  
Co.  
therl.  
Lit. 1.  
Plow.  
Bro.  
tor,

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are v  
144.

executor \* or administrator shall recover and have this. See more \* P. 474. *infra* at numb. 39.

Co. 6. 18. The power and interest which the executor hath is wholly by 26. What an  
9. 38. 5. 27. the will. And hence it is, that an executor, whether he be ab- executor  
Plow. 280. solute or conditional, while he is executor, may do any thing as may do by  
9 Ed. 4. 47. executor, (except only, sue for debts and duties due to the testa- virtue of his  
36 H. 6. 7. tor) as well before the probate of the will, as he may do after, executor-  
Fitz. Admin- for before the probate he may enter into and seise the goods and ship: and the  
istrator 2. 6. chattels whatsoever they be, or give power to another so to do: power of an  
*he may sue out  
a writ but  
cannot declare* and if any of them be taken or kept from him, he may have an executor,  
action of trespass, or a replevin to recover them; he may give adm nistrator, or ordi-  
or sell any of the goods or chattels; he may pay any of the nary.

deceased (1). But it is otherwise in the case of an administration; for in as much as his power and interest is given to him wholly by the administration, therefore he can do nothing until the administration be granted. And yet in this case, as to the goods taken away before the administration, the administration shall have such a relation as to give the administrator an action for them. But otherwise, after the administration is granted, the interest and power of the administrator is equal to and with the power and interest of the executor. And yet it is otherwise of the power and interest of the ordinary; for howsoever it seems by the ancient common law he might seise, preserve, give, grant, and dispose the goods of the intestate to pious uses, yet might he not sue for the goods or debts due to the intestate, no more than he might be sued for any debt due from the intestate; and at this day he may only keep and preserve the goods of the deceased until administration be granted; and sue him, in the court of the ordinary, that doth detain the goods from him; and perhaps may sue him that shall take the goods out of his possession; for he may not sell or give the goods of the deceased, nor receive or release any debts; for in case where there is an executor made that is capable, &c. he is not to meddle at all with the estate until the executor refuse: and where there is no executor, or that the party is dead intestate, the ordinary is presently to commit the administration to the nearest of the kindred; which when he hath done, his power is at an end; for it is doubted of some whether he may repeal an administration without cause or not: but it hath been clearly held by all, that he may not dispose of the estate afterwards; and that he hath not power to enforce the administrator to give portions to children out of the estate; and that if he do go about it, either before or after the granting of the letters of administration, the administrator may have a prohibition. And accordingly divers have been granted: and yet notwithstanding it seems this course is usual; and prohibitions not often granted at this day. \* An executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take them away, and justify it; but he must do it within convenient and reasonable time, as within thirty days after his death or thereabouts, and in a quiet and fair manner, when the

Co. 8. 135.  
9. 39.  
Dier 255.  
W. 11m. 2.  
cap. 20.  
3<sup>d</sup> Ed. 3.  
C. 11.

Hil. 13 Ja.  
Co. Co. B.  
Henslow's  
case. Trin. 3.  
Jac. Co. B.  
Davis's case.  
Hil. 2 Car.  
Co. 9. Po-  
therlie's case.  
Lit. sed. 69.  
Plow. 281.  
Bro. Execu-  
tor, 129.

\* P. 475.

(1) See more amply what acts an executor may do before proving of the will, and how far such acts are valid, in case the executor afterwards dies before probate, in *Went. Off. Ex.* 34.—*God. Orp. Leg.* 144.—*Bac. Abr. Executors, &c.* (E. 4).—*Vin. Abr. Executors* (A, 2).—*Cim. Dig. Administration* (B. 9.) door.



door is open, &c. <sup>m</sup> He may keep any of the goods of the de-<sup>m</sup> Dier 2.  
ceased, so as he pay or lay out as much of his own money in and  
about the administration of the same estate. <sup>n</sup> He may, if he <sup>n</sup> Plow. 543.  
wants money to discharge funerals, or pay debts, sell any of the 544.  
chattels real or personal whereof the deceased died possessed; and  
that albeit the thing in particular be devised: as if a man be  
possessed of a term of years *inter alia*, and devise the same term  
to I S.; the executor or administrator, notwithstanding this de-  
vise, may at any time before assent given to the legacy, if he  
have not assets to pay the debts, sell this term, and the legatee is  
remediless. And so he may do also albeit there be enough besides  
to pay the debts, and he have no need; but then in this case the  
legatee shall have some relief in a court of equity against the  
executor or administrator for damages, but the sale is unavoid-  
able. An executor or administrator may retain so much of the Plow. 184.  
estate as to satisfy his own debt first, if any be due unto him. 543.  
And if he have enough to pay all the debts and legacies, he may Co. 5. 28.  
pay them in what order he will, without danger to himself, or  
wrong to creditors or legataries. And if he hath not enough,  
he may pay them in what order he will, but not without danger  
to himself. But if any thing be due to himself, he may pay that  
first of all; and for others that are in equal degree, he may pay  
which of them he will first. And for the legataries, he may  
prefer which of them he will, or pay one of them his whole le-  
gacy, and pay another a part of his, or not pay him any part of  
his legacy, if there be no assets to do it. But an executor or The addi-  
administrator may not sell any thing that is given in special to on to justice  
a legatee, to pay another legacy given to another legatee; nor Dodridge's  
compel a creditor or legatee to take some of the goods of the Treatise 93.  
deceased for his debt or legacy whether he will or no; nor devise Kelw. 62.  
the goods he hath as executor or as administrator; neither can 27 H. 8. 20.  
executors or administrators make division of the goods amongst Plow. 525.  
them.

*regnum an  
he must pay  
this totally.*

Infant.

An infant that is an executor, after the time he is capable, hath Co. 5. 28.  
as much power as another executor of full age; for he may sell  
the goods, receive debts, and make releases for the monies he  
doth receive, assent to a legacy when debts are paid, sue, and be  
sued, as another executor. And he is only disabled to do any  
thing to hurt himself; and therefore if he release a debt before  
he receive it, the release is void; and if he assent to a legacy  
before the debts are paid, the assent is void; and if he do any  
other \* act which would be a wasting of the goods in an execu-  
tor that is of full age, it shall not bind him. And it seems that And so was.  
howsoever an infant executor after seventeen years of age may it held by  
sell any of the chattels personal he hath as executor, yet that justice Hut-  
after his age of seventeen years, and before he is twenty-one ton at Sa-  
years of age, he cannot sell a lease for years he hath in the rum affizes  
right of his executorship, but that such sale is void. 21 Jac.

\* P. 476.

Woman  
covert.

A woman covert that hath a husband, and is an executrix, may Bro. Execu-  
do any lawful act as another executor may do; but she may not tor 178.  
do any thing to prejudice her husband; as release a debt before 152.  
it be paid, assent to or deliver a legacy before the debts be paid, Fitz. Execu-  
or the like: and yet the husband himself may do so. tor 55.  
Co. 5. 28.

27. The of-  
fice, duty,  
and charge  
of executor,  
or adminis-  
trator, and  
of the ordi-  
nary.

The office and duty in general of an executor or administrator Co. 8. 133.  
is, to dispose all the estate of the deceased wherewith he hath  
to do. 1. Truly, not to convert any of it to his own use, but  
to

Doct.  
75.  
Plow.  
Kelw.

Doct.  
35.  
Stat. 2  
c. 5  
Dier 1  
Swinb.  
6. sect.  
7, 8, 9

See Pr  
infra at  
numb.  
Co. 9.  
Plow.  
545.  
Dier 80  
Doct. 6  
75, 76  
78. 132  
33 H.  
cap. 39  
Co. 5.  
4. 54.  
60. 8.  
Dier 2  
32.

(1)  
if he is  
making  
—Swi.

to the use and best advantage of the deceased, nor to labour by any undue practise or means to hinder any creditor of his debt.

2. Lawfully, to pay debts and legacies in that order the law prescribeth. 3. Diligently, *quia negligentia semper habet comitem infortunium* ; but more particularly, the first duty and care of an

Doct. & St.  
75.  
Plow. 543.  
Kelw. 64.

executor or administrator, after he hath taken upon him the charge of the administration of the goods and chattels of the deceased, after the goods are laid up, is to see the body of the deceased, laudably interred according to his rank and quality ; wherein let the executor or administrator take this caution by the way, not to exceed in funeral pomp, especially if it be so that the estate will scarcely reach to pay the debts ; for let his expences be what they will, the judges (who in this are to determine what shall be allowed) will allow what they please, and they are pleased in such cases to allow but a small matter ; and whatsoever the executor or administrator doth lay out more, he must bear out of his own estate,

First, in the funerals.

Doct. & St.

35.  
Stat. 21 H.  
8. c. 5.  
Dier 166.  
Swinb. part  
6. sect. 6.  
7, 8, 9, 10.

if he have not enough besides to pay the debts. The second duty and care must be to make an inventory, *i. e.* a schedule containing a true and perfect description of all the goods and chattels of the deceased at the time of his death ; as of his wares, merchandizes, emblements, and the like, with their appraisement and value, and of none else, and of all debts due to him and from him. And this must be made by and before two of the creditors or legataries of the deceased (if there be any such and they will do it) and two others, or, in case they refuse, by and before two other men of the honest neighbours. And herein let the executor or administrator take this caution by the way, not to intermeddle with the goods before he hath done this ; for howsoever he may do any act as executor before the inventory be made, yet the ordinary may punish this upon him, except it be done with the ordinary's licence, who, in this case, may give what time \* he will for the doing of \* P. 477. it ; and until the inventory be made and put in, it shall be presumed against the executor or administrator that he hath assets in his hands to pay all men ; and besides, until this be done, he cannot deduct to satisfy his own debt first, and bar other men by plea. But of the other side, when he hath made and exhibited a true and perfect inventory of all the goods and chattels, it shall be presumed against him, that he hath so much as is contained in the inventory and no more, unless more can be proved by witnesses (1). 3. The third thing whereof the executor or administrator is to take care, is to prove the will if there be any : and this the ordinary will compel him to do, but otherwise he may do any thing as executor, save only, sue actions, as well before probate as after. 4. The fourth thing whereof the executor or administrator must take care, is to sell and make money of the goods and chattels, and to receive the debts due to the deceased, and then to pay the debts and legacies due to the creditors and legataries ; wherein the executor or administrator must be very cautious and wary. And for this purpose let him observe, that all the debts must be paid before any legacies be paid or delivered ; and there be not enough besides to pay the debts, any thing given

Secondly, making an inventory.

Thirdly, in probate of the will.

Fourthly, in payment of debts and legacies ; and the order of payment of debts and legacies.

See Probate  
infra at  
numb. 41.  
Co. 9. 88.  
Plow. 184.  
545.  
Dier 80.  
Doct. & St.  
75, 76, 77.  
78. 132. Stat.  
33 H. 8.  
cap. 39.  
Co. 5. 28.  
4. 54. 59.  
60. 8. 132.  
Dier 232.  
32.

(1) And this inventory must be delivered to the ordinary upon oath of the executor or administrator, if he is thereunto lawfully required—2 *Bl. Com.* 510.—See further as to the necessity and manner of making an inventory, in *Went. Off.* 50.—4 *Burn's Ecc. Law* 235.—*Com. Dig.* Administration (B. 7.)—*Swinb.* 420.

by way of legacy may be sold to make money to pay the debts, and the legataries must lose their legacies; for *legatarii continent de lucro captando, creditores autem de damno vitando*. And in payment of debts this decorum must be observed: 1. Amongst persons that are creditors, the executor or administrator himself shall be preferred; so that if any debt be due to him, he may deduct to satisfy himself first, albeit others lose their whole debt thereby, and especially then when his debt is in equal degree with others debts (1). 2. After the executor or administrator is served and satisfied his debt, then the King is to be preferred; so that if there be any debt due to him, and he begin his suit for it before any other man can get a judgment for his debt against the executor or administrator, his debt shall be paid before any others. 3. After the King is served and satisfied his debt, then the debts of common persons must be paid. And these also must be paid in this order or manner: 1. The debts due by record, by any judgment had against the deceased in any judicial proceeding in any court of record. 2. The debts due by statutes or recognizances entered into by the deceased; for the debts due upon judgments must be satisfied before these; *sic judicium prius vel posterius*. 3. The debts due by obligations and penal and single bills; for these are in equal degree, and these are to be paid after statutes and recognizances. And yet if the statute or recognizance be only for performance of covenants, and no covenant is broken, an obligation for the payment of present money shall be discharged before it. 4. The debts due for \*rent upon leases of land, or grants of rents; but some say that debts due for rent in the testator's lifetime (be the rent reserved upon leases made by or without deed, for years, or at will) are in equality of degree with debts due upon specialties. 5. The debts due for servants wages and workmen. 6. The debts due upon shop-books and verbal contracts; and yet it is said by some, that legacies are to be paid before debts due by shop-books, bills unsealed, or contracts by word, *quod non credo*. And amongst debts also that are in equality of degree, those that are due are to be paid before those that are not due; and those whose day of payment is already come before those whose day of payment is not yet come: and yet if the creditor, whose day of payment is already come, do not sue for his debt, until his debt, whose day of payment is at a day to come, become due, the executor or administrator may satisfy which of them he will first (2). And amongst debts that are due and already to be paid, those that are first sued for, are to be first paid; or if the creditors begin their suits together, the executor or administrator may pay which he will of them first; and to pay debts in any other order is dangerous: and therefore for this purpose, if the deceased owe two several debts of ten pounds a-piece to two several creditors by

21 Ed. 4. 21.  
Bro. Executor 88.  
172.  
Co. 8. 132.  
Dier 32.  
Plew. 279.  
280.  
Bro. Executors 103.  
Kelw. 74.

\* P. 478.

Addition to  
just. Dod-  
ridge 92.

Waring & Davies  
1 P.W. 295

See next page

(1) See accordingly, 1 Roll. Abr. 922.—Plew. 543.—An executor or administrator hath a right at law, in case of debts in equal degree to prefer one to another, to retain for his own in the first place against any other creditor, for he cannot sue himself; and this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worse condition than all mankind besides; but an administrator may not retain against his co-administrator in equal degree; but shall be decreed to account.—See Chapman v. Turner, in Chancery 26th February 1738. Vin. Abr. Executors (D. 2.) pl. 2.\*

(2) Though he has nothing left for the other; for until a suit is commenced the executor has not legal notice of the debt, Dier 32.—2 Leon 60.

See *Rushmore v Shaw* 3 Bunsford East 557

several



several obligations, and the executor or administrator hath enough only to pay one of them, he that can first get judgment and execution shall first be satisfied; and if the executor or administrator do afterwards pay the other his debt, he must satisfy the first out of his own estate. If one that hath a debt due to him from the deceased upon a simple contract, or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and bills unsatisfied; in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due upon bills and bonds, he must satisfy so much out of his own estate, as he hath so paid, or suffered to be recovered from him; for, in the case of an action brought, he is to plead and to set forth these debts upon especialties, and to say that he hath no more but what is sufficient to satisfy them, &c. and thereby he shall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceased upon an obligation sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation for want of pleading the judgments, &c. or doth voluntarily pay that debt, and he hath not assets besides to pay the debts due upon judgments, &c. in this case, he must pay so much out of his own estate towards the satisfaction of \* the said debts due upon judgments, &c. as he hath paid of the debt due upon the obligation. But here it must be noted that no judgment or statute that is discharged or is left and suffered to lie by agreement to bar others of their debts, shall be any bar to others that sue for their due debts upon obligations, &c. and therefore if any executor or administrator shall plead any such judgment, &c. in bar of any other debt sued for by any other creditor, the creditor may by special pleading set forth this matter of covin, and avoid the plea and bar of the executor or administrator. If one creditor, whose debt is in equal degree and presently due and to be paid, begin a suit against the executor or administrator for his debt, and he hath notice that the suit is begun against him, or the action is laid in the county where the executor or administrator doth dwell, or (as some have said) in London, (in both which cases, it seems he is bound to take notice thereof at his peril) and after this suit begun, he doth make voluntary payment of another debt in equal degree in all respects, for which no suit is begun; this is a *devastavit* in the executor or administrator, and if he have not assets to satisfy him who began his suit first, he shall be compelled to satisfy so much thereof as he doth voluntarily pay to the other, and that out of his own estate: and yet an executor or administrator may make voluntary payment of any debt due by record, as by judgment, statute, &c. after such a suit begun, and justify it. If two creditors in equal degree to all purposes begin to sue for their debts at one time; in this case, the executor or administrator cannot safely make voluntary payment of either of them, unless he have enough to pay them both; but his safest way is to pay him first, that in a due and legal proceeding (for he may not covinously help one of them to a judgment sooner) can first recover it by judgment and execution: and yet if, in this case, no suit be begun, the

Covin.

\* P. 479.

see last page

Covin.

\* P. 480.

the executor or administrator may make voluntary payment to either of them in equal degree of his whole debt, albeit he have no assets left to pay unto the other any part of his debt. If *A.* and *B.* be two creditors in equal degree, and *A.* begin his suit first, and after *B.* doth begin his suit, and it happeneth that *B.* bona fide without any covin or agreement between him and the executor or administrator, doth get judgment and execution first; in this case, the executor or administrator may make payment to *B.* first of all. But if the executor or administrator doth by any covin and agreement help *B.* to his judgment and execution first, and by this means he is first satisfied, if there be not enough left to satisfy *A.* he must satisfy him out of his own estate. If two suits begin at or about one time, upon two several obligations, and the executor is forced to plead to them both \* before either of them hath a judgment, so that he cannot plead the judgment that the other hath against him, and he hath not assets to satisfy both the debts sued for, and after the plaintiffs in both the suits get judgment and execution; *Quare*, what the executor or administrator may do in this case: and here note by the way, that it is policy for a creditor that hath cause to sue an executor or administrator, to be doing betimes, and to get judgment and execution as soon as he may; for it falleth out in this case, that he that doth first come shall be first served (1). After all the debts are paid in such order and manner as before, then is the executor or administrator to pay and to deliver the legacies: and herein the executor may prefer himself so, that if any legacy be given to him, he may detain and deduct it, albeit there be nothing left to discharge the legacies given to others (2): and after he hath satisfied himself, he may satisfy and deliver what legacies he will, albeit there be not enough to satisfy all the legatees; or he may pay to each of the legatees a part of their legacy, and deduct a part out of every legacy, where there is not enough to satisfy all the legacies: but if any particular thing, as a lease, or a horse, or the like, be given; this must be delivered accordingly, and may not be sold by the executor or administrator to pay others all, or any part, of their legacies: and if there be enough to pay all the legacies, they must be paid all according to the will: and it is said by some, that if an executor or administrator make no inventory of the goods, that he must pay all the legacies whether he have assets or not. The last thing an executor or administrator is to take care of, is, to make an account, (for it is held that an executor or administrator is not bound in law or conscience to make restitution for personal wrongs) wherein this is to be known, that the ordinary may, if he will, call the executor or administrator to account concerning the goods and chattels of the deceased, either generally or particularly as the case requireth; and that with or without the creditors or legataries instigation, within a year or what time he will; unto which account he may call all the creditors, and legataries; and therein the executor or administrator must shew

Fifthly, in making an account.

(1) See more amply as to the order of payment of debts in respect to their priority, in *Swinb.* 455.—*2 Bl. Com.* 511.—*Com. Dig.* Administration (C. 2.) Chancery (3 G. 6.)—*Vin. Abr.* Executors (Q. a.) to (X. a.)—*Bac. Abr.* Executors, &c. (L. 6.)—*Went. Off. Ex.* 130.

(2) But it is said an executor may not prefer himself, in retaining his legacy, as he may a debt due to him from the testator.—See *Fretwill v. Stacy*, 2 *Vern.* 434.—*Attorney General v. Robins*, 2 *Pr. Wms.* 23.—*Swinb.* 29.

\* The order in the test refers to legal assets for where an executor is a what devises to sell and pay debts the assets are equitable and he is considered as a trustee. A court of equity in that case marshals the assets and pays the creditors pari passu whether by specialty or simple contract. *Newton v. Bennet* 1 *Browne* 139.

Co. 5. 8.  
9. 39. 1.  
sect. 23.  
F. N. B.  
120.  
Dier 23.  
Doct. &  
132.  
Bro. Ex.  
cutor 90.  
Testame  
27. Stat.  
Ed. 3. c.  
13 Ed. 1.  
c. 19. 2.  
H. 8. 23.

Doct. & St.  
34.  
Plow. 547.  
Swinb. 110.  
114.

\* West. 2.  
c. 22.  
b F. N. B.  
117.  
c Der 32.  
d Co. 11.  
e Co. 6.  
f Co. 9. 8.  
g Stat. 9 H.  
c. 4.  
h Bro. Ex.  
cutor 161.  
i Co. 5. 2.  
k 7 H. 4.  
l Co. 4. 5.  
m Bro. Ex.  
cutor 169.  
n Bro. Ex.  
cutor 122.  
o Co. 9. 8.

(1) See  
(2) And  
§c. (E.)—  
(3) For  
shall have  
damages  
2 Lev. 26.

Charles v. d.  
4 Vis. Am.  
In all c  
to having  
mortgage.

what he hath received, and what he hath laid out, and prove it in such sort as the ordinary shall like: and then if it be found he hath faithfully and fully administered, the ordinary may acquit him of the burthen, and then he is discharged of all suits in the spiritual court; but this account and discharge will not help nor avail him at all to discharge him of suits at the common law (1).

The office and duty of the ordinary, after the death of any person within his diocese, is, if he hear of any will made, and any executor appointed, to cite the executor, and to compel him to come in and prove the will, and to accept and take upon him \* the administration of the goods, or to refuse it; and if the executor refuse, or if there be a will made and no executor appointed, the ordinary must commit the administration *cum testamento annexo* to whom he shall think fit, and take bond of the administrator to perform the will. And if there be no will made, he is to grant the administration of the goods to the next of kin, if he or they require it; and if not, to whomsoever besides shall desire it; or, if nobody seek it, he may grant letters to whom he will *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands: and then it seems he is to pay therewith the debts and legacies of the deceased, so far as the same will reach, in such order as the executor or administrator is to pay them. See more of this question in numb. 29. *infra* (2)

An executor or administrator regularly shall charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions the deceased might have had, the same actions for the most part the executor or administrator may have also: and therefore he may have an <sup>a</sup> action of account, <sup>b</sup> an action of trespass *de bonis asportatis in vita testatoris*, <sup>c</sup> an action of debt against a gaoler upon the escape of a prisoner, <sup>d</sup> a writ of error upon the statute of 27 *Eliz.* <sup>e</sup> an attainder upon the statute of 23 *H. 8.* a writ of restitution upon the statute of 21 *H. 8.* <sup>f</sup> an action upon the case, upon the *assumpsit* of the testator, <sup>g</sup> an *in dempnitate nominis* when the deceased's goods are taken upon an outlawry against another man of his name, <sup>h</sup> an action of covenant for breach of a covenant made to the deceased (3), <sup>i</sup> an action upon the case, upon the trover and conversion of the goods of the testator, <sup>k</sup> an *ejectione firme* for an ejectionment of the testator out of a term, <sup>l</sup> an action of debt for the rent behind in the life-time of the deceased, <sup>m</sup> an action of debt for the arrearages of an annuity due to the testator in his life time, <sup>n</sup> and a ravishment or ejectionment of ward for a wrong done to the deceased. <sup>o</sup> But an executor or administrator shall not charge another, or have any action against him, for a personal wrong done to the testator, when the wrong done to his person, or that which is his, is of that nature, as for which damages only are to be recovered: and therefore an executor or administrator cannot sue another for the beating or wounding of the deceased, or for a trespass done to him in his

\* P. 481.

28. Where and how an executor or administrator shall charge others in respect of the estate of the deceased: and what actions and remedy he may have against others and what not, and how.

Co. 5. 83.  
9. 39. Lit.  
sect. 233.  
F. N. B.  
120.  
Dier 232.  
Doct. & St.  
131.  
Bro. Executor 90.  
Testament.  
27. Stat. 31.  
Ed. 3. c. 11.  
13 Ed. 1.  
c. 19. 21.  
H. 8. 25.

<sup>a</sup> West. 2.  
<sup>c</sup> 22.  
<sup>b</sup> F. N. B.  
117.  
<sup>c</sup> Dier 322.  
<sup>d</sup> Co. 11. 41.  
<sup>e</sup> Co. 6. 80.  
<sup>f</sup> Co. 9. 86.  
<sup>g</sup> Stat. 9 H. 6.  
<sup>c</sup> 4.  
<sup>h</sup> Bro. Executor 161.  
<sup>i</sup> Co. 5. 27.  
<sup>k</sup> 7 H. 4. 6.  
<sup>l</sup> Co. 4. 50.  
<sup>m</sup> Bro. Executor 169.  
<sup>n</sup> Bro. Executor 122.  
<sup>o</sup> Co. 9. 89.

(1) See further at what time and in what manner an executor must account, in *Swinb.* 464.  
(2) And further as to the office of the ordinary, in *Vin. Abr. Executors* (A.)—*Bac. Abr. Executors*, *Ec. (E.)*—*Stat. 4 Ann. c. 16. § 16.*  
(3) For a covenant broken in the life-time of the testator, the executor, and not the heir or assignee, shall have the action of covenant, although it were a covenant real, which runs with the land, and the damages shall be recovered by the executor, though not named, as he personally represents the testator, *2 Lev. 26.—Vent. 175.*

cattle,

*Case of L. Scarborough. Equitable appts are applied in payment of judgment creditors before others.*  
In all cases where a creditor has advanced money on the general security he may tack. So having a mortgage he may advance a further sum on judgment and tack this to his mortgage; or having a mortgage he may get hold of a former judgment & tack: but having



cattle, grafs, or corn, or for waste done by his tenant in his lands; for these are said to be personal actions which die with the person, according to the rule, *actio personalis moritur cum persona*.

If the testament be kept from the executor, he may have remedy to recover it in the spiritual court: so if the goods of the deceased be kept from him, he may sue there for them if he will, or \* he may sue in any court of common law. And if there be a will, and an executor made, or two administrations granted together, he that is rightful executor or administrator may sue the wrongful administrator for the goods in his custody.

If one grant a rent out of his land for life, provided that it shall not charge his person, and the rent is behind, and the grantee dieth; in this case, the executor or administrator of the grantee may have an action of debt for these arrearages.

If any rent, or arrearages of rent, be due to me upon a grant of rent out of any land to me, or reservation of rent upon any estate made by me of land; in these cases, my executor or administrator may have an action of debt for this rent, or he may distrain for it, so long as the land chargeable with the rent, and out of which it doth issue, is in his possession that ought to pay it, or in the possession of any one that doth claim by or under him.

If any of my household servants do convey away and eloin, or destroy any of my goods; my executor or administrator may have a special commission out of the chancery to enquire of and to punish it. And in case where a man doth sue as executor or administrator, he must in his action name himself as he is; *i. e.* if he be an executor, he must name himself so; and if an administrator, he must name himself so: and if there be many executors, and some accept and some refuse, if they bring any action, they must be all named in the writ: and yet if one executor have goods in his possession and he alone sell them, perhaps for this contract he may bring an action for the money in his own name; so also if the goods be taken out of his possession alone, it is said he alone may sue for them; but the safest way in these cases is to sue in the names of all the executors; for the possession of one of them is said to be the possession of all of them (1).

29. Where an executor or administrator shall be charged by others, and what actions and remedies may be had against him, or not. An executor or administrator regularly shall be charged by others, for any debt or duty due from the deceased, as the deceased himself might have been charged in his life time, so far forth as he hath any of the estate of the deceased to discharge the same. And therefore if a man bind himself by obligation or covenant to pay money, or do any such like thing; and do not bind his executors or administrators by name; in this case, the executor or administrator may be sued and may be charged as far forth, &c. as if they were named. And yet where the covenant is but personal, as where one doth make a lease for years, and the lessor doth covenant to pay the

(1) Where there are divers executors, the action commenced by them, or against them, ought to be commenced in all their names, and not in the name of some of them only; because they all represent the person of the testator, therefore they must join in all suits brought to recover his estate, and as well those who refused, as those who proved the will, must be named; but where they are defendants, those only are to be named who proved the will, *Swinb.* 6th edit. p. 324.—See more amply, what actions may be brought by executors or administrators, and in what manner, in *Com. Dig.* Administration (B. 11.)—*Bac. Abr.* Executors, &c. (N.) and (O.)—*Went. Off. Ex.* 95.—*God. Orp. Leg.* 154.—*Fin. Abr.* Executors (Q)

- quit rents, but he doth not say during the term; by this it seems the executor or administrator of the lessor shall not be charged.
- e Co. 9. 86. <sup>o</sup> An action of the case lieth against him upon *assumpsit* of the simple contract of the testator, especially \* where the ground of the *assumpsit* is a true debt, a *rationabili parte bonorum* lieth against him; a *detinue* lieth against him for the goods delivered to the deceased, if the executor or administrator do still continue the possession of them; and also an action of debt lieth against him for arrearages of account found upon the deceased before auditors. \* P. 483.
- Plow. 182.
- F. N. B. 121.
- 3 H. 6 35.
- 11 H. 4. 45.
- Stat. 25 Ed. 1. c. 11. The executor or administrator of the father, that hath levied aid of his tenant for the marriage of his daughter, shall be charged with it, and the daughter may sue for it.
- F. N. B. 56. The executor or administrator of a guardian in chivalry, that doth commit waste in the ward's lands, shall be charged, and may be sued by the heir for it.
- Co. 5. 12.
- Co. 8. 94. If a man, possessed of a term of years, devise it to another, and the executor or administrator of the deviser, before the assent to the legacy, doth commit waste in the land in lease; in this case, he shall be charged with, and may be sued for, this waste by him in reversion: but if the executor die, his executor shall not be charged with it: for it is a personal wrong that dieth with the person.
- Dier 370. If a bishop grant an annuity out of his lands to *I. S.* for life, and die; in this case, it seems the executor or administrator of the bishop shall be charged with the arrearages due in the bishop's time.
- Bro. Executor 127.
- Co. 3. 24. 22. If a lease for years be made rendering rent, and the rent is behind and the lessee die; in this case, the executor or administrator of the lessee shall be charged for this rent. So also if lessee for years assign over his interest and die, his executor or administrator shall be charged with the arrearages before the assignment, but not with any of the arrearages due after the assignment.
- Bro. Executor 157. The executor or administrator of a customer or comptroller shall be charged upon a *taille* (or *tally*) of the exchequer shewed to the testator.
- Westm. 2. c. 35. The executor or administrator shall be charged for a ravishment or ejectment of ward by the deceased.
- Trin. 7 Jac. B. R. The executor or administrator may be charged in the spiritual court for tithes due from the deceased: but he may not (as it seems) be sued in any temporal court for them.
- F. N. B. 51.
- Curia 21. The executor or administrator of a man that recovereth a debt upon a judgment had by the deceased, shall be chargeable with restitution, if the judgment be reversed for error.
- Jac. B. R.
- Co. 9. 87. An executor or administrator shall nor be charged for any personal wrong done by the deceased; and therefore no action may be brought against him for any such cause; as because the deceased did burn the deed of the plaintiff, suffer a prisoner at his suit to escape, cut down his trees, eat up his grasse, beat or wound the \* body of the plaintiff, defame him in his name, or the like; for \* P. 484.
- F. N. B. 117.
- Dier 322.
- 11 H. 4. 46.
- Doct. & St. 76.
- Co. 8. 94. 133. all these are said to be personal actions that die with the person; neither is there any remedy to be had against the executor or administrator in equity in these cases, neither shall he be charged in any action of account for any receipt or occupation by the deceased. And yet perhaps an action of the case may lie in this case: neither will an action of debt lie against him upon simple contract of the deceased, but an action of the case only. Neither will an action lie

lie against an executor or administrator upon an arbitrament made in the life-time of the deceased, albeit it be made in writing. Neither will any action lie against any executor or administrator for costs given in the star-chamber or chancery against the deceased in a suit there; but when the party dieth, the same is lost: and where a man doth sue an executor or administrator in a suit, he must charge him as he is, viz. if he be an executor, he must sue him by that name; if an administrator, then by that name. And where there be many executors, and have all accepted, they must be all sued; but if some of them have refused perhaps the suit may be good enough against the rest (1). But otherwise one executor cannot be charged without his companions, except it be in the case of summons and severance, and in some special case where one alone doth the wrong and the like, as where one executor alone doth detain the deeds from the heir; for in this case, he alone may be charged. See more *infra* at numb. 39 (2).

30. What act one executor or administrator alone may do; and where the act or laches of one may prejudice or bar his companion, and where not.

All the executors, where there be more than one, be they never so many, in the eye of the law are but as one man; in which respect the law doth esteem most acts done by or to any one of them, as acts done by or to all of them. And therefore the possession of one of them of the goods and chattels of the deceased, is esteemed the possession of them all; payment of debts by or to one of them is esteemed payment by or to them all; the sale or gift of one of them of the goods and chattels of the deceased, the sale and gift of them all; a release made by or to one of them, is a release made by or to them all; and the assent of one of them to a legacy the assent of them all. And therefore if there be two executors, and one of them deliver up the obligation to the debtor whereby he is bound, the other executor shall not recover it in a detinue. So if two executors have lands or goods in execution, and one of them release all his interest, this is a total discharge of the execution. And yet if in this case there be any practise between the executor and the creditor in this matter, and there be not assets besides to pay all the debts and legacies, here perhaps the other executor may have remedy in equity against his co-executor and the creditor. But how the law is of administrators, *quare*; for some think that one of them also may sell goods, release debts, plead to actions or the like, without the other.

\* P. 485.

If one executor attorn to the grant of a reversion, or a rent, this is as good as if they did all attorn, and will bind all the rest; as in case of an assent to a legacy; for in this case, the assent of one will bind all the rest, albeit there be not enough to pay the debts besides the legacy given away by assent; but his assent shall not hurt his co-executors in a *devastavit*.

If one executor appear to an action sued against them all, or plead a plea to it; this for the most part shall be said to be the appearance and plea of them all, and shall bind the rest.

If two executors sue together, and one of them is summoned and severed; in this case, he that is summoned may before judg-

(1) See the note to fo. 460. before, and also *Went. Off. Ex.* 95.

(2) And further as to what actions may be brought against executors and administrators, and in what manner, in *Bac. Abr. Executors, &c.* (P.)—*Com. Dig. Administration* (B. 14.)—*Went. Off. Ex.* 116.—*Swinb.* 397.—*Vin. Abr. Executors* (H. a.)—*God. Orp. Leg.* 162.



ment release the duty; but if the other prosecute to judgment first, and then he that is severed acknowledge satisfaction, this will not benefit the defendant; nor bar the rest that are plaintiffs in the judgment. And if three executors sue, and two are summoned and severed, and the third recover and die; in this case, the other two shall have execution. See more at *numb. 27. supra.*

27 H. 8. 21.

6 H. 7. 5.

Plow. 343.

Fitz. Execu-

tor 6.

One executor or administrator cannot give or sell any of the goods or chattels of the deceased to another executor or administrator; and therefore they may not make division of the goods amongst themselves; and regularly one of them cannot sue another of them. And therefore if one keep, give, or sell all the goods, release debts, or the like, in the disturbance of the execution of the will or due administration of the estate; it seems the other hath no remedy against him, except it be in the case of covin before: but if all the residue of the goods and chattels after debts and legacies paid be given to one of the executors alone; and after the debts and legacies paid, the rest do detain it or any part of it from him; in this case, perhaps he may have some remedy against them.

11 H. 483.

If the debtor make his creditor and another his executors, and the creditor doth refuse the executorship, and the other doth accept it; in this case, the creditor may sue the executor for this debt: but if both prove the will, and one of them die, the surviving co-executor cannot sue the executor of the dead executor for this debt. And if one make a woman and two others his executors, and a creditor before she doth accept of the executorship doth marry her; in this case, he may sue the other executors for this debt; but if she have accepted of the executorship first, *contra.*

*Harrison v. Shaw  
3 Bump. 1 East*

Plow. 543.

Co. 532.

Doct. &amp; St.

75.

Perk. sect.

488. 570.

Kelw. 59.

A *devastavit* or waste in an executor or administrator is when he doth mis-employ the estate of the deceased, and misdemean himself in the managing thereof against the trust reposed in him. \* And this may be done divers ways, as 1. When the executor or administrator doth bestow more upon the funeral of the deceased than is meet, having respect to his degree and estate. 2. When he doth pay legacies in money, or assent to legacies given in other things before the debts are paid, and hath not enough besides to pay the debts. 3. When he doth not pay the debts in that order and manner as is before set down; but doth pay them first that he should pay last, and he hath not enough to pay them all. 4. When he doth release a debt or duty due to the deceased before he doth receive it; or when, the goods of the deceased being taken from him, he doth release to him that doth take them the action, whereby he may recover them. 5. When he doth sell the goods of the deceased much under value, especially if it be with covin, as to his near friends, to his own use, to have money under hand, or the like; but otherwise to sell them under value, especially where he cannot conveniently make more of them, is no waste. All these, and such like acts as these, are said to be a waste in an executor or administrator; and being discovered against him by the return of the sheriff, (or as some think by inquest of office) it will produce this effect, to make the executor or administrator chargeable, for so much as he hath mis-employed and wasted, *de bonis propriis*; so that any creditor may charge him for the debt due to him from the testator as for his own proper debt; and for so much the execution shall be made

\* P. 486.

32. *Devastavit quid.*

What shall be said a *devastavit* and wasting of the goods of the deceased by an executor, or administrator, and how he shall be charged thereupon.

Dier 185.

Co. 5. 32.

Old B. of

Entries 11.

made against him upon his own body, lands and goods: and yet so as one executor or administrator shall not be charged for the waste of another; for if there be many executors and one of them only doth commit the waste, he only shall be punished for this waste. And the executor or administrator, if he do commit a waste in the gift or sale of goods, shall answer it alone: For he to whom the goods are given or sold, shall not be punished for it; neither shall the executor or administrator of the executor or administrator be punished for it after his death. And howsoever the husband shall be charged in a *devastavit* for the waste of himself or his wife, where she is an executrix whilst they both live together; yet if a woman executrix take a husband, and during the marriage he or she doth commit a waste, and after she dye; in this case, it seems the husband shall not be charged for the waste himself or his wife did: *Sed quere* of this. For if a void administration be committed, and the administrator do waste the goods, and after the administration is committed to another; in this case the first administrator may be charged by the creditors for the waste done in his time (1). But an executor or administrator may lawfully sell or convert the goods of the deceased to his own use, so as he convert the money to the use of the deceased, in payment of debts, or the like, and pay so much of his own money as the goods so converted to his use are worth; and these acts are not esteemed a waste in him. Also he may sell any special legacy that is given, and this is no waste in him; howbeit it is a wrong to the legatee, if there be assets to pay debts besides. And when he hath enough to pay all the debts and legacies, then he may dispose of the whole estate how he will, without any prejudice to himself at all (2).

33. Executor of his own wrong: who shall be said to be so: and what act shall make him so to be accounted: and what act such an executor may do, and how he shall be charged, or not.

An executor of his own wrong is one that is neither lawful executor nor administrator, and yet doth take upon him to do and act such things as are only fit for and proper to an executor or administrator; as to take the goods of the deceased into his own possession; give and sell them; pay the debts of the deceased there-with; release the debts due to the deceased; and the like. And a man may make himself such an executor by any such intermeddling with the office and work of an executor, as followeth; 1. By proving the will with the money of the dead; but to prove another man's will at my own charge, will no more make me chargeable as executor of mine own wrong, than to bury the deceased in a decent manner out of mine own estate. 2. By a seizing, gaining, keeping and using the goods of the deceased as a man's own, especially if he convert them to his own use, sell, or otherwise dispose them; and every colour of title will not help in this case; for if a man make a deed of gift of all his goods and chattels to another, and dyeth intestate, and this in truth is fraudulent and in trust, and the donee after the death of the donor, doth dispose of these goods and chattels as his own; in this case, and by this means, he shall be esteemed as executor of his own wrong. And yet if the deed of gift be *bona fide* in satisfaction of a just debt, and the

(1) See accordingly, *God. Orp. Leg.* 206.

(2) See more amply what shall be deemed a *devastavit* in an executor or administrator, and in what manner remedy may be had against them, in *Bac. Abr. Executors, &c. (L.)—Vin. Abr. Executors (X. a. 5)—God. Orp. Leg. pt. 2. c. 26.—Went. Off. Ex. 157.—Cem. Dig. Administration (1.)*

Stat.  
Eliz.

Plich.  
ch. ju

Trin.  
per ch  
just.  
Co. 5.  
Kelw.

Kelw.  
52.  
33 H. 6.  
32 H. 6.  
Dier 16.  
Co. 5.  
20 Ed. 4.  
Pitz. E.  
cutor 12

See the  
before.

Dier 160

goods be no more than the debt, it may be otherwise: but if the goods be much more than the debt, there it seems it shall be charged so for the overplus; and that, whether he have them in possession or not; and so was the opinion of justice *Jones* at *Gloucester* assizes, 9 *Car.* If the ordinary grant letters *ad colligendum & vendendum* the goods of the deceased, that are like to perish, and *I. S.* to whom the letters are made, under colour thereof, doth take and sell the goods; hereby he may make himself chargeable, as executor of his own wrong: for the ordinary hath no such power himself, and therefore he may not give that power to another. If a man that is next of kin procure a beggar, or a stranger, to take out an administration, and then to make him a deed of gift of all the goods for a small matter; he may be thus charged for the overplus of the worth of the goods more than he gave. So if a Debtor procure such an administration to be taken out, and then get a release of his debt from the administrator; this may make him chargeable as executor of his own wrong, for so much as his debt doth come unto. And yet a \* man \* may take away his own goods, that were in the hands of the deceased, without danger. And every having and possessing of the goods of the deceased will not make a man executor of his own wrong: for if a man dye in my house and have goods there, and I keep them until I can be well discharged of them; this will not make me chargeable as executor of mine own wrong. So if I do only lay up the goods of the deceased to preserve them in safety for him that shall have right to them, this will make me no more chargeable, than if I take an inventory of all the goods of the deceased. So if another man take the goods of the deceased and sell them to me, or give them to me; howsoever this will make him chargeable as executor of his own wrong, yet this will not make me chargeable so. Neither will every disposition of the goods of the deceased make a man executor of his own wrong; for if a man sell some of the goods of the deceased (where there is need) to help forward a decent funeral of the body of the deceased; this is no such disposition as to make a man chargeable thus. So if I deliver the wife of the deceased her necessary wearing apparel; or if I be wife to the deceased, and take it myself. So where I take any of the deceased's goods into my hands by mistake, supposing them to be mine own, or under colour of title; as when I have a good deed of gift or sale of them without any fraud or covin; or under a good authority, as when I take them upon a warrant from the sheriff that hath process out of the exchequer to take them; or as a trespasser only, as when I kill or otherwise abuse the cattle; such an intermeddling with the goods of the deceased will not make a man chargeable as executor of his own wrong, neither may I be so charged in these cases. The third way, by which a man may make himself chargeable as executor of his own wrong, is by delivering of the goods of the deceased to creditors in satisfaction of their debts, or by selling any of the goods of the deceased to pay the debts of the deceased, and paying the same with the money made thereof; but to pay the deceased's debt with a man's own money will not make him chargeable so. The fourth way, by which a man may make himself so chargeable, is by receiving any of the debts due to the deceased. The fifth way, by which a man may make him-

P. 488.

Stat. 43  
Eliz. cap. 8.Plich. 7 Jac.  
Co. B. per  
ch. justice.Trin. 17 Jac.  
per chief  
just.  
Co. 5. 34.  
Kelw. 63.Kelw. 63.  
52.  
33 H. 6. 31.  
32 H. 6. 6.  
Dier 167.  
Co. 5. 34.  
20 Ed. 4. 17.  
Fitz. Exe-  
cutor 122.See the cases  
before.

Dier 166.

H h

self



self chargeable so, is by releasing any debts or duties due to the deceased. The sixth way, by delivering any legacies given by the deceased in kind, or by paying any legacies, except it be with a man's own money. The seventh way, by taking a man's legacy given to him, before the executor have accepted of the executorship and assented to the legacy. The eighth way, by suing as executor to the deceased for any debt due to the deceased. And the ninth way, by taking upon him to sell the lands of the deceased as his executor. In all these cases, \* and by all these and such like means, a man may make himself an executor of his own wrong: so that if an executor after he hath legally waved the executorship, or an administrator after his administration is repealed and revoked, intermeddle with the estate in any such manner, he may be charged as executor of his own wrong: and if a woman take more of her wearing apparel than is necessary and convenient for one of her rank, and condition, without legacy of the husband, and licence of the executor, she may be charged thus.

\* P. 489. And if a man, under colour of an administration that is not good, or of a commission *ad colligendum bona defuncti* that is not good, or of a will, when in truth there is none at all, or no good will, do take upon him to intermeddle with the goods, and to dispose of the estate in manner as aforesaid, by this means he may make himself chargeable thus. And in these cases, and by these means, such persons that do so intermeddle, do make themselves to be accounted in law, executors; but executors by wrong only, and not executors by right. And therefore such persons have not the favor nor power of lawful executors, as to bring an action for debt due to the deceased, to deduct and pay themselves any debt due to themselves first of all, and to bar other creditors, and the like. And for so much as they have so disposed and mis-employed, and for no more, they make themselves chargeable to any creditor or legatee of the deceased that shall sue them, as far forth as a lawful executor is chargeable. And albeit he, that doth thus, be a creditor, yet this will not help him; for a creditor may not enter upon the goods of the deceased, and pay himself first; and if he do so, if there be a lawful executor or administrator made, he may sue the creditor; and if there be no executor or administrator made, the creditor may by this means make himself chargeable to other creditors, as executor of his own wrong, for so much as he hath taken into his own hands: and then a man shall be charged the rather in these cases, and by this means, when there is no executor made; or, if there be an executor made, when he doth refuse to take upon him the executorship; nor any administration granted: for when a man dieth intestate, and a stranger taketh and useth the goods of the deceased as his own, albeit he pay no debt or legacy, nor do any other act as executor, yet, when no other man taketh upon him the administration, this intermeddling shall make him chargeable as executor of his own wrong: for in that case the creditor hath no other remedy: but in case where there is an executor made, and he doth prove the testament, and doth take upon him the administration of the goods, and then a stranger taketh out of the hands of this executor, or getteth into his own hands, all or some of the goods of the deceased, and useth them as his own; \* P. 490. \* this will not make this stranger executor of his own wrong; for

Dier 166.

Dier 105.

Dier 166.

33 H. 6. 31.

Dier 255.

160.

Co. 5. 34.

9. 39.

Co. 5. 34.

Plow. 148.

145.

33 H. 6. 31.

Dier 210.

Plow. 184.

Co. 5. 33.

Co. 5. 33.

Kelw. 59.

(1) Se  
him, in  
tor (C.)

for now there is a lawful executor, against whom the creditor may have his remedy; and the executor shall have his remedy for these goods against the stranger; for they are and shall be accounted assets in the hands of the executors still, notwithstanding the stranger hath the possession of them: And yet in this case also, where there is a rightful executor, if a stranger shall take the goods into his hands, claim to be executor, pay debts and legacies, and receive debts, and intermeddle as an executor; in this case, perhaps, and by this express administration as executor, he may be charged as executor of his own wrong, albeit there be a lawful executor: and if a man die intestate, and a stranger intermeddle with the estate as before, and then the administration is granted to another; in this case, the stranger may be charged by any creditor or legatee as executor of his own wrong, for his intermeddling before the administration granted; for the rightful executor or administrator shall be charged with no more than what doth come into his hands. And if an administration be granted afterwards to any one that hath so intermeddled with the goods before; this will not purge the wrong done before; and therefore in this case, a creditor may charge him as executor of his own wrong, or as a lawful administrator, at his election (1).

Pasche. 39  
Eliz. Co. B.  
Bradbury v.  
Reynolds.

Co. 5. 29.

6. 27. 9. 27.

What is  
and is made.

The administrator *durante minori etate* is a special kind of administrator, and is in case where an infant under the age of seventeen years (for at that age an infant is capable of an executorship) is made an executor, and the administration of the goods (as the manner is in that case) is committed to one or more of the next friend or friends of the infant during his minority, which is until he be of the age of seventeen years; he that hath such an administration granted unto him is such an administrator. And he is sometimes general; *i. e.* when his administration is granted unto him without any words of limitation; and sometimes he is special; *i. e.* when his administration is granted to him *ad opus & usum* of the infant only. In the first case, he hath as large a power as another administrator hath; and therefore he may assent to a legacy, albeit there be not assets to pay debts; he may sell any of the goods or chattels of the deceased, or give them away, or the like, as another administrator may do. But in the last case, it is otherwise: for such a special administrator can do little more than the ordinary himself; and therefore he may not sell any of the goods or chattels of the deceased, except it be in case where they are like to perish, for funeral expences, or for payment of debts; nor may he assent to a legacy where there is not assets to pay debts, &c. And this administration is *ipso facto* determined, when the executor doth come to the age of seventeen years: and therefore if it be granted during the minority of four executors, \* and one of them dye, or come to the age of seventeen years; now is the administration determined: And if the executor be a woman, and she take a husband that is seventeen years of age or upwards; in this case, it seems the administration is determined: And therefore also it is, that if such an administration *durante mi-*

34. Admini-  
strator du-  
rante minori  
etate; what  
he is, and  
his power,  
and when it  
shall end.

\* P. 491.

This is different  
now: a minor  
executing, marrying,  
does not end the  
administration, although  
if she were married  
before she  
became an  
executrix  
her status  
is altered

(1) See further as to what act will make an executor *de son tort*, and what remedy may be had against him, in the references in the note to page 447.—and see also a Bl. Com. 507.—Com. Dig. Administrator (C.)

*nor* *etate* be granted after the executor is seventeen years of age, the administration is void (1).

35. Where an administration, once committed by the ordinary, may be afterwards revoked; and what shall be said a revocation of such an administration, or not; and what acts done before shall stand in force, or not.

It hath been held, that the ordinary, after he hath granted the administration of the goods of a man intestate to one, may afterwards without cause revoke the same and grant it to another, at his pleasure: and that if the ordinary grant letters of administration to one, and after grant letters of administration to another, of the goods of the same man, that hereby the first letters of administration are *ipso facto* countermanded, albeit there be no words of revocation in them: but it seems the law is otherwise, and that after the ordinary hath granted the administration according to the charge and direction given him by the statutes, he cannot afterwards revoke it, and grant it to another, without cause; *i. e.* unless the first administration be illegally granted; as when it is granted to a stranger, and not to the next of kin, or the like; or unless the first administrator cannot or will not administer; for, in these cases, he may without doubt grant the administration to another. And yet in these cases, where there is a former administration granted regularly, all acts that the first administrator doth lawfully execute and do as administrator, as sale of goods, payment or receipt of debts, making releases, and the like, are good, and shall bind the next and succeeding administrator. And therefore, if the ordinary, after the death of a man intestate, doth grant the administration of his goods to a stranger; and then the next of kin doth sue by citation to have it repealed; and the first administrator, hanging that suit in the spiritual court, doth sell the goods, of purpose to defeat the second administration; and after, the first letters of administration are revoked by sentence, and the first sentence annulled, and the administration is committed to another; in this case, the second administrator cannot recover these goods or have any remedy for them. And yet perhaps, if there be any fraud in the case, an executor may have relief upon the statute of 13 *Eliz.* But if the first suit and sentence be by appeal avoided, then all that the first administrator doth is void; and the second administrator may recover the goods notwithstanding the sale: and if the first administration be upon condition, all the acts the administrator doth, before the condition is broken, are good; and therefore, if he give or sell the goods, the subsequent administrator cannot avoid it.

- If a man dye intestate, and have not *bona notabilia*, and the  
 \* P. 492 \* Bishop of the Diocese grant letters of administration to one; and after, the archbishop doth grant letters of administration to another; in this case, the effect of the first administration is suspended, until the other be repealed and declared by sentence to be void. If there be a will, and it is concealed, and thereupon an administration is granted; and after, the will is produced and proved; in this case, the administration is *ipso facto* determined, and all the acts the administrator hath done *ab initio* are become void. See more in the next question.

(1) An administrator *durante minori etate* cannot be charged as executor *de suo tert.*, where he wastes the goods; because he had a lawful authority to possess them: but when the infant comes of age, he may bring an action of detinue for the goods in the possession of such an administrator; but the safest way is, to charge him upon the special matter, *Swinb.* 333.—See further as to the power of an administrator *durante minori etate*, and its continuance, in *Vin. Abr.* Executors (M.)—*God. Orp. Leg.* 102.—*6m. D. g.* Administration (F.)—1 *Wood* 147.—*Curson's Supplement to Went. Off. Ex.* 119. 139.—*Eac. Abr.* Executor (B. 1.)



If a will be made by an ideot, and an executor appointed there-  
in, and the executor take upon him the administration, and after  
the will is avoided for the weakness of the testator; in this case,  
it seems that all the acts the executor doth before the avoidance  
of the will, are good, and not to be avoided by the admini-  
strator.

36. What  
acts done by  
one execu-  
tor or admini-  
strator,  
may be a-  
voided by  
the subse-  
quent execu-  
tor or admini-  
strator,  
and what  
not.

3 H. 7. 14. If there be a will made and an executor appointed, and the or-  
dinary cite the executor to come in and prove the will, and he  
doth not come, and thereupon the ordinary doth grant the admini-  
stration to another; in this case, all acts done by the admini-  
strator are good, and shall bind the executor; if he may and  
shall afterwards take upon him the executorship. But otherwise it  
is where the ordinary doth grant the administration before the  
executor be cited to appear, or before the time given him to take  
upon him the administration; for in this case, nothing that he doth  
shall bind the executor.

Co. 6. 18. When there is an administration granted, and it is afterwards  
19.  
Plov. 282.  
Co. 8. 143.  
135. upon a suit by condition only repealed; in this case, all acts done  
by the first administrator are good and shall bind the subsequent  
administrator. But in case where the first administration is upon a  
suit by appeal by sentence annihilated and declared void, there all  
acts done by the first administrator are void, and shall not bind the  
subsequent administrator: And therefore if the ordinary of the  
diocese grant an administration that doth belong to the metropo-  
litan to grant, (in which case, the administration is void,) all acts  
done by the administrator are void, and may be avoided by the suc-  
ceeding administrator. But when the administration doth belong to  
the ordinary of the diocese to grant, and the metropolitan doth  
grant it, (in which case, it is only voidable,) in that case, all acts  
upon and by virtue of the first administration before the second ad-  
ministration is granted, are good.

Willson v.  
Packman.  
M. 37. 38.  
Eliz. B. R.

If an administration be granted to a stranger, and afterwards it  
is revoked and granted to the next of kin; in this case, all lawful  
acts done by the first administrator before, and hanging the suit,  
are good and unavoidable by the subsequent administrator; and  
yet perhaps if the first administrator waste the \* goods, it may be \*  
he may be charged for this by the subsequent administrator, or by  
a creditor.

P. 493.

Plov. 281. Where the executor by the will is not to administer until a cer-  
tain time; in this case, the administration of the goods is to be  
281.  
Co. 6. 19. granted until that time, and all acts done by such an administrator  
34 H. 6. 14. before that time are good, and shall bind the executor. So where  
an executor is made, or an administration is granted upon condi-  
tion, which is after broken, so that the executorship or admini-  
stration is determined; yet, in this case, all acts done by him be-  
fore this time are good.

4 H. 7. 13. If there be a false and a true will, and the executor of the false  
Plov. 282. will prove this will first, and afterwards the executor of the true  
Co. 5. 33. will doth disprove and avoid the first will; in this case, he may also  
Dier 30. 80. avoid all acts the first executor doth.

37. What  
shall be said  
a good bar  
in debt, or  
other action  
brought by,  
or against  
an executor  
or admini-  
strator, and  
what not.

Co. 8. 132. The same bars and pleas regularly, that a man may have to ac-  
134. tions brought by the deceased himself in his life, a man may have  
21 H. 6. 19. to bar the action and suit of his executor or administrator after  
Dier 2. his death. But an executor or administrator may have, besides  
27 H. 8. 6. an executor or admini-  
Co. 9. 108. strator, and  
2 H. 4. 21. what not.

the same pleas and bars to actions the deceased might have had, as *non est factum, per duresse, non assumpsit*, and the like, divers other pleas and bars to actions in respect of his estate and condition as executor or administrator: for if he never meddle with the goods and chattels of the deceased, and yet be sued as executor or administrator, he may plead *ne unques, i. e.* he did never intermeddle as executor or administrator; and if this be found for him, this will bar the plaintiff; and if he do intermeddle and take upon him the administration, he may plead, if the case be so, that he cannot recover the goods of the deceased; for he shall be charged for no more than what he can get in his possession; or he may plead that he hath fully administered all the goods and chattels of the deceased, and hath nothing left to administer; or he may plead, that he hath paid so much of his own money as the goods in his hands do amount unto; or if he be sued for debts due by obligations, or such like specialties, entred into by the deceased, he may plead that there are debts due, and yet to pay, on judgments had against the deceased; or that there are debts due and yet to pry on recognizances or statutes entred into by the deceased, and that he hath no more than enough to satisfy them; or he may plead that there are judgments had against him for other debts of the deceased in equal degree with the debt sued for, and that he has no more than enough to discharge them; so as these former debts, on and for which these judgments were had and statutes given, be *bonâ fide* due, and the judgments, recognizances, and statutes in truth continued for the same: for if there be any fraud in the case, *viz.*

\* P. 494. that either the judgments, recognizances, or statutes, were \* at first entred into, or are afterwards continued, of purpose to deceive or delay others of their due debts, when either the debt is satisfied, or compounded for less, or the like; in these cases, this plea will not serve; but this matter being disclosed, by the plaintiffs pleading, he will avoid it: and if he be sued for a debt due upon a simple contract or promise of the testator, he may plead there are debts to pay due by obligations and other specialties, entred into by the deceased, and that he hath no more than enough to satisfy those debts, and this will bar the plaintiff in his action: and therefore if an executor or administrator plead a judgment in bar of an action of debt upon an obligation, he must shew also that the suit, whereupon the judgment was had, was upon an obligation; for, if it were on a simple contract, it is no bar. And if the executor be sued for debt on an obligation, he may plead he made voluntary payment of other debts due upon obligations, or gave new security for them in his own name before the suit began, and that he hath no more than enough to satisfy them. But to plead such a voluntary payment or giving of new security, after suits begun upon this obligation now in suit, is no good plea. If an action be brought against an executor or administrator on an specialty for money, it is no good plea in bar of this action to plead a statute or recognizance with defeazance to perform covenants, when there is no covenant broken. If a suit be against an *Curia Tri.* executor or administrator for a legacy, it seems it is no good plea *37 Eliz.* to plead a bond, with condition for performance of covenants, or for the doing of any other collateral thing, that is contingent only, and not yet broken. It is no good plea in an action for an

*Trin. 39.*  
*Eliz. B. R.*  
 executor

2 H. 6.  
 Dier 1.  
 80.  
 Co. 9.  
 94.  
 9 H. 6.  
 34 H.  
 Bro. E.  
 cutor  
 105.  
 Lit. Br.  
 sect. 2.  
 Kelw.  
 Bro. E.  
 tors 10

Atwor  
 case.  
 Mich.  
 39. El.  
 34 H.  
 46 Ed.  
 Fitz.  
 cutor  
 Co. 5.  
 8. 13.  
 Dier 1.  
 32.

(1)  
 ment  
 (2)  
 frauds  
 priis b

executor or administrator to say, that the deceased was outlawed. (1).

2 H. 6. 12. An executor or administrator may make himself chargeable of 38. Where, and in what  
Dier 185. his own goods, either by omission; as when he being sued upon case, an ex-  
80. an obligation, or the like, and there is a judgment against him or ecutor or  
Co. 9. 90. the deceased in force, and he hath but enough to satisfy that administra-  
94. judgment, and he doth not plead this in bar of the present action, tor shall be  
9 H. 6. 57. but doth suffer the plaintiff to recover against him; in this case, charged by  
34 H. 6. 45. he must satisfy this second debt out of his own estate; or by com- his own act  
Bro. Execu- mission; and that either by doing; as when he doth any act that or pleading  
tor 141. is a waste in him, and thereupon a *Devastavit* is returned against upon his own  
105. him; (for in this case he must answer so much as he hath wasted goods; and  
Lit. Bro. out of his own estate;) or by saying; as when a suit is brought where execu-  
sect. 29. against him, and he doth plead such a false plea therein as doth tion shall  
Kelw. 61. tend to the perpetual bar of the plaintiff in the action, and yet it be *de bonis*  
Bro. Execu- is of a thing that doth lie within his perfect knowledge, as when *propriis*;  
tors 164. he doth plead he is not executor, nor did ever administer as exe- and where  
cutor, and upon tryal of this issue against him it be found he is not.  
a \* rightful or wrongful executor; in this case, he must satisfy P. 495.  
this debt out of his own estate, whether he have assets or not, and  
the execution upon the judgment had in this suit shall be *de bonis*  
*propriis*. And if an executor or administrator be sued, and he plead  
to the action *plenè administravit*, and upon trial it is found against  
him; in this case, if he have any of the goods of the deceased  
left in his hand, the execution shall be of them; but if he have  
none of the goods of the deceased left, the execution shall be, and  
he shall be charged for so much as is found to be in his hands, *de*  
*bonis propriis*. But where he is sued upon a promise made by the  
testator, and he plead *non assumpsit* to it; and where he is sued  
upon a deed made by the testator, and he plead *non est factum* to  
it, or the like; and these issues upon tryal are found against him;  
or when he shall confess the action, or suffer a judgment to go by  
default against him; or plead any vain plea; in all these cases, he  
shall not be chargeable of his own estate, neither shall the judg-  
ment and execution in these cases be *de bonis propriis*, but *de*  
*bonis testatoris* only for the debt, and *de bonis propriis* for the  
costs: and yet if an executor or administrator shall entreat a cre-  
ditor to forbear his debt until a day, and then promise to pay  
him; by this promise he hath made himself chargeable as for his  
own debt; howbeit it shall be allowed him upon his account (2).  
But in all these cases, and such like, where a man shall be  
charged of his own estate, and the execution shall be *de bonis*  
*propriis*, it seems the judgment is always *de bonis testatoris*;  
and the course is this, the first execution is against the executor  
*de bonis testatoris*, and not *de bonis propriis*; and after a *devasta-*  
*vit* returned by the sheriff against the executor or administrator,  
and not before, a new execution is directed to the sheriff to levy  
the debt *de bonis testatoris*; and if there be none of them to be  
found in his hands, then to levy them *de bonis propriis*. And

Atworth's  
case.

Mich. 38.

39. Eliz.

34 H. 6. 45.

46 Ed. 3. 9.

Fitz. Exe-

cutor 9.

Co. 5. 32.

8. 134.

Dier 185.

32.

(1) See fully as to pleadings in actions by or against executors and administrators, in *Com. Dig.* Abatement (F. 10.) Pleader (2 D. 1)—*Vin. Abr.* Executors (Z. 2. 2.) &c.—*Savinb* 397

(2) See accordingly, *God. Orp. Leg.* 199.—but this promise must be in writing, under the statute of frauds 29 *Car. 2. cap. 3. § 4.*—See further in what cases an executor makes himself liable *de bonis propriis* by his promise to pay his testator's debts or legacies, in *Bac. Abr.* Executors, &c. (M. 2)

therefore



therefore if an executor or administrator be sued by a creditor, and the executor or administrator plead a *plene administravit* generally, or plead specially that he hath no more but to satisfy a judgment or the like; and upon trial this issue is found against him, and it is found he hath in all or part enough to satisfy the debt; in these cases, the judgment is *de bonis testatoris*, and thereupon an execution is (as in other cases) to levy the debt *de bonis testatoris* in the hands of the executor or administrator, and for the costs *de bonis propriis*. And upon the return of the sheriff a special execution doth issue forth to levy the money *de bonis testatoris*: *Et si constare poterit* that he hath wasted the goods, then that he shall make the execution *de bonis propriis*. And hereupon also the plaintiff may if he will have a *capias* against the body, or an *elegit* against the lands of the executor or administrator, \* and no other course of proceeding can or may be had against the executor or administrator in this case. Dier 210.

\* P. 496.

An action of debt was brought against two executors, and one of them did appear and confess the action, and the other made default, and thereupon judgment was given to recover against them both *de bonis testatoris* in their hands, and execution accordingly: and upon this execution the sheriff did return a *devastavit* against the executor that made default only, and hereupon a *scire facias* went out against him alone, and afterwards an execution against him alone *de bonis propriis* (1). Terms of the law. Co. super Lit. 374.

Assent.  
Quid.

Assets in this case, is said to be where one dieth indebted and maketh his executor, or dieth intestate, and the executor or administrator hath sufficient in goods or chattels or other profits to pay the debts or some part thereof; this is said to be assets in his hands, and for so much he shall be charged.

39. What shall be said to be assets in the hands of an executor or administrator to charge him, or not.

All those goods and chattels, actions and commodities, which were the deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship and administration, and all such things as do come to the executor and administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee. And herein these things are to be known; 1. That assets in the hands of one of the executors shall be said to be assets in the hands of all the executors. 2. That assets in any part of the world shall be said to be assets in every part of the world: and therefore if that point be in issue, and it appear that there is assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there is assets. 3. All goods and chattels of what nature or kind soever that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets. 4. All the goods and chattels that come to the executor or administrator in the right of their executorship or administration, and that are by law given to them by virtue thereof in the right of the deceased (for which, see before Kelw. 63. Kelw. 51. Co. 6. 47. Co. super Lit. 388. Co. super Lit. 388. 5. 34. Dier 362. Kelw. 63.)

(1) See further in what cases an executor shall be charged *de bonis propriis*, in *Sewinb.* 390.

Co. super  
Lit. 54.  
Dier 362.

20 H. 7. 4.  
Bro. Affets  
12.

Co. super  
Lit. 124. 5.  
31.  
Bro. Affets  
24.  
Dier 264.  
121.  
2 H. 4. 21.  
Co. 6. 58.  
Kelw. 63.  
Dier 362.

Curia Mich.  
13. B. R.

Co. 1. 98.  
Plow. 84.  
252.

Co. 5. 34.

Co. 1. 87.  
Bro. Leaies  
63.

Trin. 7 Jac.  
B. R. Si-  
mon's case.  
Co. 8. 136.

at Numb. 25.) and which are in possession, shall be esteemed assets in his hands. And therefore a feoffment, made to the use of the feoffor for life, and after to the use of his executors and assigns for twenty years, in this case, it seems this twenty years shall be said to be assets in the hands of the executor of the feoffor. And goods pledged to the deceased and not redeemed, or the money wherewith it is redeemed, when it is redeemed, shall be said to be assets in the hands of the \* executor or administrator. And if the deceased doth appoint that the executors shall sell his lands to pay his debts, the money, that is made of the land when it is sold, shall be said to be assets in his hands. 5. All the goods and chattels in action or in possibility at the time of the death of the deceased, that are afterwards recovered, and are gotten in possession into the hands of the executor or administrator when they are so recovered, are esteemed assets in his hands. But they are never accounted assets, until they are recovered and come in possession; and therefore if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator, until he hath recovered them. So likewise if there be debt or damages recovered by a judgment had by the deceased, but no execution is done; until execution be made, this shall not be esteemed assets in the hands of the executor or administrator. So if the executor bring an action of trespass against another *de bonis asportatis in vita testatoris*, and he have a judgment for damages; in this case, until he hath recovered it by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable; in this case, albeit it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore if one sue another, and recover against him as administrator of *I. S.*; and after a testament made by *I. S.* is produced and proved, and thereby an executor is made; in this case, the money recovered by the administrator shall not be said to be assets in his hands as to any of the creditors, because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator do never recover and get the thing into his possession, he shall never be charged, especially there where he hath done his best to get it and cannot. If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly; in this case, this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor. And whatsoever the executor or administrator must be forced to sue for by the name of executor or administrator, being recovered, shall be esteemed assets in his hands. 6. Albeit the thing be extinct and gone as to the executor and administrator himself, yet it may have its being and be accounted assets as to the creditors and legatees. And therefore if an executor or administrator have a lease for years of land in the right of the deceased, and afterwards he doth purchase the fee simple of the land (whereby the lease is drowned) yet in this case this lease shall continue to be assets as to the creditors and legatees still. And if the debtee make the \* debtor his executor, or the debtee die in-  
testate,

\* P. 497.

\* P. 498.

testate, and the administration is committed to the debtor; in these cases, this debt shall be said to continue, and shall be esteemed assets for so much as to other creditors. And if a woman executrix have goods worth twenty pounds, and she marry with one of the creditors to whom twenty pounds are owing; in this case, it seems the husband may not retain the goods to pay himself, but they shall be assets to other creditors. And yet if the debtor make the debtee his executor, he may retain so much as to satisfy his own debt; and that he doth so retain shall not be said to be assets in his hands as to any other creditor. And if *I. S.* have goods to the value of twenty pounds, and he is bound to *B.* and *C.* in twenty pounds a-piece, and he dieth intestate, and after *D.* doth administer, and then *B.* dieth, and maketh *D.* his executor; in this case, *D.* may retain this to satisfy his own debt, and it shall not be said to be assets in his hands as to any other. 7. Kelw. 63. The goods and chattels of other men in the hands of the executor Co. 6. 58. or administrator, that were in the possession of the deceased, if Dier 362. he had no right to them, or if he had, and they do not belong to the executor will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore if the goods of another man be amongst the goods of the deceased, and these come altogether into the hands of the executor or administrator; these goods that are the goods of another shall not be said to be assets in the hands of the executor or administrator. And if the executor doth receive a rent that doth belong to the heir; this rent shall not be said to be assets in his hands: and hence it is, that if the deceased were outlawed at the time of his death, that his goods and chattels are not to be accounted assets, for they are none of his. 8. If an executor of his own wrong, to whom twenty pounds are owing, doth enter upon so much of the goods of the deceased as is worth twenty pounds, intending to pay himself; this shall be esteemed assets in his hands to make him chargeable for so much to any creditor or legatee. 9. If the deceased have goods worth twenty pounds, and owe twenty pounds to *A.* and ten pounds to *B.* and he compound with *A.* for ten pounds; in this case, the executor shall be said to have assets, and be charged to pay the debt of *B.* also. 10. If a man have a lease for years worth twenty pounds *per annum* at the rent of five pounds and he die; in this case, not the whole value of the land, but so much as is above the rent, shall be said to be assets in the hands of the executor or administrator (1).

40. Probate.

Quid.

Quotuplex.

The probate of a testament is the producing and insinuating of it before the ecclesiastical judge, ordinary of the place where the party dieth, or other that hath power to take the same. And this is done in two sorts, either in common form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity \* that the will exhibited is the last will and testament of the party deceased, which is the ordinary course; and this

(1) See more amply what shall be deemed assets in the hands of the executor, in *Bac. Abr. Executors, &c.* (H.)—*Gsd. Orp. Leg.* 180.—*Vin. Abr. Executors* (G. 2.)—1 *Atk.* 463.—2 *Atk.* 206.—The editor has, during the present chapter, occasionally omitted inserting references to the latest reporters, under a presumption, that the cases contained in them are either inserted in the edition of *Bacon's Abridgment* lately published, or will be so in the edition of *Comyn's Digest* now in the press.



the ordinary may accept if he will. Or *per testes*, i. e. which is, when over and besides his oath he doth also produce witnesses, or maketh other proof to confirm the same; and that, in the presence of such as may pretend any interest in the goods of the deceased, or at least in their absence after they have been lawfully summoned to see such will proved if they think good. And this course is used only where there is a suspicion of the will, and a caveat is entred; or where there is a fear of contention and strife between the kindred and friends of the party deceased about his goods; for a will proved in common form may be called into question at any time thirty years after; and when the will is thus exhibited into the bishop's court, the same is to be kept by his officers, and the copy thereof in parchment under the bishop's seal of his office to be certified and delivered, which parchment so sealed is called the will proved.

Co. super  
Lit. 292.  
Perk. sect.  
482.

Perk. sect.  
491. 462.  
486.  
Co. 9. 36.  
Fitz. Testa-  
ment 4,  
3. 5.  
Plow. 280.  
Stat. 23 H.  
8. c. 9.  
21 H. 8.  
c. 5.  
See before  
at numb. 21.  
Swinb. part  
6. sect. 11.

Stat. 23 H.  
8. cap. 9.

The probate of the will (as having respect to the goods and chattels) is in some respect necessary; for howsoever, as touching any freehold of lands devised, it is not at all material; and howsoever the executor before probate may receive and release debts, and do most other acts as executor, yet he cannot sue for any debt due to the testator. And if the executor delay the probate, the ordinary may by process compel him to come in and accept of or refuse the executorship. And when it is proved, it must be proved by the executors or one of them at least; and if all the goods of the deceased be within the same diocese wherein he lived and died, the executor must prove it before the ordinary of the diocese, or before his lawful commissary or deputy, or before the archdeacon or his deputy or commissary (as their composition is), or if the goods be in a peculiar, then before him that is judge of that peculiar; or if the goods be within two peculiars, then before the ordinary of the diocese wherein these two peculiars lie. But if there be *bona notabilia* in the case, viz. that the testator have goods or chattels at the time of his death of the value of five pounds or more, lying in two or more counties, or have good debts upon especialties (as some say), for otherwise they follow the person; or have any especialties (as others say) lying in other counties for debt, so that there be of goods and chattels or good debts to the value of five pounds in any other diocese than that wherein the testator led his life and died, then the probate doth belong to the archbishop of that province wherein it is, unless the ordinary of the same diocese have the probate by composition between him and the metropolitan; for otherwise there must be several \* probates for the goods in every \* diocese (as anciently was used in these cases) (1). But if a man die in his journey in another diocese, and have more than five pounds goods about him, this shall not be said to be *bona notabilia*, but the will may be proved before the ordinary of the place where the deceased lived and his estate doth lie. And except it be in cases where men have *bona notabilia*, the officers of the courts of the metropolitans are not to cite men out of their own

41. Where the probate of a will is necessary and where not; and by and before whom; and in what time it must be proved.

P. 500.

(1) Five pounds is the sum or value of notable goods: but where, by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the dioceses of London, it is ten pounds by composition. 4 Burn's Ecc. Law 179.—4 Inst. 335.—What shall be deemed *bona notabilia*, See Vin. Abr. Executors (H.)—God. Orp. Leg. 69.—Com. Dig. Administrator (B. 4.) dioceses;

diocess; and, to discover this matter, it is the duty of the ordinary of the diocess, when any man comes to prove a will, to give him an oath, and examine him whether he know of, or do believe, there are any goods to the value of five pounds lying in any other diocess at the time of the testator's death, and if he hear of any to dismiss them to the prerogative court, and to give them notice of it: also in some places, the Lords of manors have the probate of all the wills within their manor by custom of the place; and in those places it must be proved there, and not elsewhere. And when an executor is bound to prove the will before the ordinary as before, the ordinary may give him what time to do it he doth think fit, and, when he doth prove it, the ordinary doth take an oath of him to administer the goods faithfully, and to take bond of him also if he please; but this some do omit (1).

And now because lands are oftentimes conveyed by the several kinds of assurance aforesaid unto one man, but to the use of another, and to the intent that another shall take the profits of it, we must of necessity hear somewhat of the learning of uses, and then we shall have done.

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(1) See fully before whom a will is to be proved, and in what manner, in *Swinb.* 427.—*Treat. of Equity* 108.—*Went.* 44.—2 *Black. Com.* 508.—*Com. Dig.* Administration (B. 6.)—*Bac. Abr.* Executors, &c. (E.)—*Vin. Abr.* Executors (B. 2.)—4 *Burn's Ecc. Law* 176.

## C H A P. XXIV.

## Of a Use.

Co. 1. 121,  
122.  
See the ad-  
dition to  
justice Dod-  
ridge's  
Treatise.  
Co. super  
Lit. 271.  
272.

\* **A** USE is the profit or benefit of lands or tenements; or, as **P. 501.**  
others define it, the equity and honesty to hold the land **1. Use.**  
in *conscientia boni viri*: or, as others define it more fully; It is a **Quid.**  
trust or confidence reposed in some other, which is not issuing out  
of the land, but as a thing collateral annexed in privity to the  
estate of the land, and to the person touching the land; so that he  
for whom he is trusted shall take the profit of the land, and the  
terre-tenant shall dispose of it according to his direction: as for an  
example, if a feoffment be made to *I. S.* and his heirs, to the use,  
profit or behoof of *W. S.* and his heirs; in this case, heretofore  
*I. S.* had the estate and property of the land, but *W. S.* had and  
was to have the profits in honesty and equity. So if one agree  
with *W. S.* for a piece of land for twenty pounds and pay him the  
money, but hath no assurance of the land, yet the equity and ho-  
nesty to have this land is in him that hath contracted and paid his  
money for it: and this trust was called the use of the land; and  
hence came the course in conveyances to set down in the *Habendum*,  
to whose use; as *Habendum* to *A.* and his heirs, to the use of *A.*  
and his heirs: and he for whom this trust is, and that ought to  
have the profit of the land by conveyance as aforesaid, is called  
*cestuy que use*. There is a use also of goods and chattels, which is  
properly called a trust or confidence, for one may have such things  
to the use of another. **Cestuy que use. Trust or confidence. Quid.**

Doct. & St. **A** use is either express; *i. e.* when the use or intent is openly **2. Quota-**  
95. declared and expressed between the parties, upon the making of **plex.**  
Perk. sect. the estate of land, whereunto the use is annexed; as when a feoff-  
533. ment is made of land to *I. S.* and his heirs, to the use of *W. S.*  
Co. 2. 58. and the heirs of, or heirs males of, the body of the said *W. S.* or to the  
9. 11. end and intent that *W. S.* and his heirs, or *W. S.* and the heirs of  
Dier 18. his body, shall take the profits of it, or the like; or when I co-  
146. venant to stand seized of the land to the use of my wife for life, and  
after of my eldest son, and the heirs of his body, or the like. Or,  
it is implied; *i. e.* when the use is not declared upon the agreement  
between the parties, but is left to the construction and made by the  
operation of law; as when a man seized of land doth make a fe-  
offment in fee, or doth levy a fine, or suffer a common recovery of  
it to another, without any consideration, and it is not agreed nor  
declared to what use or intent it shall be; this by construction of  
law shall be to the use of the feoffor, conusor, or recoverer: but  
if there be any consideration of money, or other thing, paid or given,  
or any rent \* or tenure reserved, then, by construction of law, it  
shall be to the use of the feoffee, conusee, or recoverer: for other-  
wise the law presumeth, that the intent of him that did part with  
the land was so, (*viz*) that the other should have the property  
of the land to his use, and that he himself should take the  
profits of it. So when one doth bargain and sell his land for  
money **\* P. 502.**



money to another, and no use is expressed; in this case, the law doth say, it shall be to the use of the bargainee and his heirs. A Co. 1. 121. use also is either in *esse*, and that in possession, reversion, or remainder; as when a feoffment is made to *I. S.* to the use of *I. W.* and his heirs, or to the use of *I. W.* and after to the use of *I. D.* and the heirs males of his body, and after to the use of *S. T.* and his heirs for ever: Or, it is in *posse*, or in contingency; as when by possibility, it may happen to be in possession, reversion, or remainder; as where a use is limited to me for life, and after to him that shall be my first son in tail, this is only the possibility of a use, for it may or may not be.

3. The nature, incidents, and original of it.

A use at the common law, before the statute hereafter spoken of was made, was, and, where that statute doth not take place, is, nothing but a meer confidence and trust, collateral to and distinct from the land, annexed in privity to the estate, and to the person touching the land, to this purpose, that *cestuy que use* should take the profit of the land, and the feoffee or terre-tenant that was trusted should make estates, and otherwise dispose of the land as the *cestuy que use* in his life, or at his death by his last will and testament, should direct and appoint; and if he made no disposition, then that it should go to his heir; so that the feoffee had the freehold or sole property of the thing in him, and *cestuy que use* had neither *jus in re* nor *jus ad rem*, (for if he against the will of the feoffee had entred into the land, he had been a trespassor,) but a bare confidence or trust, for which the *cestuy que use* had no remedy, but in chancery, upon breach of the trust, and there to have the feoffee imprisoned until he perform the trust according to the order of the court. And these uses, to some purposes, were reputed in law as chattels, and therefore were devisable by will; and to some purposes as hereditaments, and a kind of inheritance of which there was a *possessio fratris*, &c. and to some purposes, neither chattels nor hereditaments; for they were not esteemed assets in the heir or executor; neither were they reputed as commons, rents, conditions, and such like inheritances, which are discontinued or taken away by the alienation of the terre-tenant, escheat, disseisin, &c. but a use is not so.

Incidents of it.

\* P. 503.

And to every of these uses, there were two inseparable incidents, confidence in the person, and privity in the estate expressed by the parties, or implied by the law; and when either of these failed, the use was either gone for ever or suspended for a time at the least: and therefore if the feoffee to use, upon good consideration had enfeoffed another of the land that had not notice of the use, the use had been gone for ever; because howsoever here was a privity of estate, yet here was no confidence in the person: but if the feoffment had been without consideration to such a one; in this case, the use had remained still, because the law did imply a notice: So also it seems the law was when it was made in consideration of marriage only. And if a disseisor, abator, or intruder, had come to the possession of the land whereof the use was, albeit he had notice of the use, yet the use was suspended during their possession, and they should not have been seized to use as the feoffee was; for they come not to the land in the *per* but in the *poss.* And if a lord by escheat, lord of a villain, or one that had

Co. in Chud. leigh's case, in toto, & Shelley's case. Kelw. 160. Dier 12. Bro Feoffment all uses in toto Confidence. 25.

Trin. 17 Jac. Cancellaria.

See 1049 v. Will. Rolle's Rep.

Doct. 8. 96. Co. 1. 124. Stat. 27. H. 8. c. in the preamble.

(1) F. Bac. L. (2) A. tem, 2. uses.—

had entred for mortmain, or that had recovered in a *cessavit*, &c. had come to such land and had notice of the use, the use had been gone for ever; for these came to the land in the *post* and above the use: and tenant in dower, and by the curtesy, should not be seized to uses in being, for all these wanted privity of estate: And if there had been tenant for life, the remainder in fee to the use of another, and the tenant for life had made a feoffment in fee to one that had notice of the uses, this second feoffee should not have stood seized to the first uses: So if the husband had made a feoffment in fee of the land of his wife, upon consideration, and without any use expressed, the wife should not have had a *Subpana*; because the feoffee was not in privity of estate of the wife: and if *cestuy que use* for life or in tail, the remainder in tail with divers remainders over in use, had made a feoffment to one that had notice; he should not have been seized to the first uses *causa quâ supra*. But otherwise it is of commons, advowsons, and such like appendants or appurtenants; for if tenant in tail, or husband in right of his wife, make a feoffment of a manor, or of part of it, with an advowson appendant; the advowson, at least after presentment, shall pass as appendant to the manor, or to part of the manor, and not to the estate of the land which is discontinued by the feoffment. So a disseisor, abater, intruder, or the lord by escheat, or the like, shall have these things as annexed to the land or the possession of the land; so that there is a difference between a use, a warranty, and such like things that are annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments that are annexed to the possession of the land.

Doct. & St.  
96.  
Co. 1. 123.  
124.  
Stat. 27.  
H. 8. c. 10.  
in the pre-  
amble.

And these uses began first when the custom of property began and was brought in, that one man knew his own from another man's, and then was to enjoy his own, and not to be deprived of it without consent or order of law; for then he that had land, had two things in him, a possession of the land, and power to take the profits of it; and those being to be distinguished, he might give the free-hold or possession to another, and take the profits himself; and they were the rather allowed by the law for a time as reasonable, because they gave a man power to dispose of his land by will, which otherwise he could not have done but in some special cases by custom of the place (1): but in time this use was turned into an abuse, and the greatest part of all the lands in the kingdom, especially in the time of the broils between the houses of York and Lancaster, were put in use, partly of fraud, and partly of fear, which produced not a few inconveniences; for thereby many were deceived of their just and reasonable rights (2); as namely, a man that had cause to sue for his land, knew not against whom to bring his action, or who was owner of it; the wife was defrauded of her thirds; the husband of being tenant by the curtesy; the lord of his wardship, relief, herriot, and escheat; the creditor of his extent for debt; the poor tenant of his lease, and other purchasers of their purchase: for these rights and duties were given by the

The original of it, and why so much lands were put in use.

\* P. 504.

The mischief of uses.

(1) For the nature, origin, and introduction of uses, see *Gilb. Law of Uses* 3.—2 *Bl. Com.* 327.—*Bac. Law Tracts* 302.—*Wood* 625.—*Vin. Abr.* Uses (A. 3.)

(2) About the reign of *Edw. IV.* courts of equity first began to reduce uses into a kind of regular system, 2 *Bl. Com.* 329. for before that time, there are not six cases to be found relating to the doctrine of uses.—See *Bac. Tracts* 313.

law from him that was owner of the land and none other, which at this time was the feoffee of trust; and so the feoffor, the old owner of the land, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet the feoffee was not such a tenant of the land, as that his wife might have dower; for the land be extended for his debt; or that he might forfeit it for felony or treason; or that his heir should be in ward for it; or any duty of tenure fall to the lord by his death; or that he could make any estates of it (1): also lands were many times conveyed by last wills by word only, and sometimes by tokens only in time of great extremity of weakness; and many perjuries for tryal of secret uses were daily committed. All which having been espied, have been laboured to be cured and holpen by divers particular acts of parliament in all succeeding ages: but the makers of these laws, finding the continuance of these uses so mischievous, that they did over-reach the policy of all laws, for a general remedy, and a perfect cure of all the said mischiefs and abuses, have at last provided,—that where any persons are, or shall be, seized of any lands to the use or trust of any other, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement or otherwise by any means whatsoever,—*cestuy que use or trust*, that hath any such use in fee-simple, for term of life, or years, or otherwise, or any use in reversion or remainder, &c. shall have the possession of the land in such quality, manner and condition as he had the use or trust (2). And where any one is seized of lands to the use or intent that another shall have a yearly rent out of the same lands, *cestuy que use* of the rent shall be deemed in possession thereof of like estate as he had the use: by which statute the use and possession of land is now at this day coupled, conjoined and married, with an indissoluble knot, so as they cannot now stand a-part and divided, but he that hath \* the one must have the other, and the one doth ensue the other as the shadow doth the body; and therefore now upon fines, recoveries, and feoffments, the estate doth settle as the use and intent of the parties is declared by word or writing before the act done: as for example, if a writing be made between two or more, that one of them shall levy a fine, make a feoffment, or suffer a recovery to the other, to the use and intent that one of them, or another man, shall have it for life, and after another in tail, and after a third in fee simple; in this case, the law settlcth the estate according to the use and intent declared, so that now what estate a man hath in the use, the same he hath in the possession. But herein for the more full understanding of this statute, and the law at this day, it must be observed, that this statute doth not extend to all manner of uses, neither are all uses executed and united to the possession hereby; for, to every execution of a use within this statute, four things are requisite: 1. That there be a person seized. 2. That there be a *cestuy que use in esse*. 3. That there be a use in *esse* in possession, reversion, or remainder. 4. That the estate, out of which the uses do arise, be vested in *cestuy que use*:—so that when these four, *viz.* seisin

To what  
uses the sta-  
tute of 27  
H. 8. doth  
extend, and  
to what not.

(1) See accordingly *Bac. Tracts* 153.—But see *Co. Lit.* 76. b.—*Jenk. Cent.* 4. case 92.  
(2) See the words of the statute 27 H. 8. c. 10. and the references thereto in the margin of *Ruffhead's* and *Pickering's* edit. of the *Statutes*.—And for some remarks on the operation of the words of that statute, see *Fearne on Cont. Rem.* 3d edit. 226.



in the feoffees, *cestuy que use in rerum natura, use in esse*, and that the estate of the feoffees doth vest in *cestuy que use*, then there is an execution of the use within this statute; but if any of these fail, there is no execution of the use within this statute: and therefore it is agreed that this statute doth not execute any use, but only uses in *esse*; so that the right of a present use, and a future or contingent use, are excluded until they come in *esse*; and then the statute doth execute them also, if no alteration be of the estate of the land before. And if *cestuy que use* in tail, with divers uses in remainder, had made a feoffment and dyed before the statute, no execution should have been of this right of a use until entry by the feoffees. So if *cestuy que use* in possession had made a feoffment before the statute; no right of the use in possession or remainder shall be executed by the statute until the entry by the feoffees: So if a feoffment had been made before the statute to the use of the feoffee for life, and after to the uses of others in remainder, and the feoffee had made a feoffment in fee to another, this use shall not be re-continued, or the re-possession of the land executed unto it, by this statute; so that the right of uses in *esse*, and uses in contingency, until they happen to be in *esse*, remain at the common law, as they were before the statute: and therefore if the estate of the feoffees be in such cases devested by disseisin; or the king, or a corporation, or an alien, or a person attainted, &c. be enfeoffed of the land before the use come in *esse*; or if the land be aliened *bonâ fide* upon consideration to one that hath not notice of the use; this use can never be executed until these possessions be removed by lawful entry or action of the feoffees; and if their entry and action be barred, the use is gone for ever, and the party grieved thereby hath no remedy but in chancery: and therefore if *cestuy que use* in tail, the remainder in tail restrained with a clause of perpetuity, be disseised; no use in contingency can be executed by this statute: and if before the statute, a feoffment had been made in fee to the use of *I. S.* for life, and after to the use of the right heirs of *I. N.* and the feoffees had been disseised, and then the statute had been made, and after *I. N.* dye, and after his death *I. S.* dye; this use shall never be executed in the right heir of *I. N.* And so also if a disseisin be after the statute and before the death of *I. N.* no possession shall be executed in the right heir of *I. N.* Also uses that need no execution by the statute; as when a man doth convey land to *I. S.* and his heirs, to the use of *I. S.* and his heirs; this doth not need help of this statute. Also uses that are against the rules of the common law, shall not be executed by this statute: and therefore if a feoffment be made to the use of *A.* for life, and after to the use of every person that shall be his heir one after another for term of his life; or if one make a feoffment to the use of another in tail, with divers remainders over, with a proviso that neither of them shall discontinue or alien, &c. these uses shall not be executed, because these limitations are wholly void; and in these cases it seems there is no remedy to be had in chancery against the feoffees. So that out of all this it appeareth, that some uses are executed presently, as uses in *esse*; and some are executed by matter *ex post facto*, if they be according to law, and come in *esse* in due time; but if they be uses invented and limited in a new manner, and not according to the ancient common law, they are altogether void, and extinguished and abolished by this statute:

Co. 1. 116.

Dier 58.

88. 330.

Co. 1. 138.

The contingent  
use, made  
before the statute,  
shall be held  
until the entry of the  
feoffee, or his  
heirs, or assigns,  
shall be made.  
Sudden Power  
Bentley  
differs in this  
respect that the  
feoffee, or his  
heirs, or assigns,  
shall be held  
until the entry of the  
feoffee, or his  
heirs, or assigns,  
shall be made.  
P. 506. to see  
uses.  
Bac. lib. 5. 773  
See Feoffee 289  
Boke v. Ryd  
5 Ves. Jun.

Conveyance to  
A in fee to the use  
of A for life with  
to the use of B in  
fee. A is in by the  
statute. But if  
to the use of B for  
life comes to the use  
of A in fee, A will  
be in by common  
law.

See in a  
will book  
entry in a  
will.  
Bentley  
P. 506.

and where lands are conveyed to others in trust after this or the like manner, viz. that the feoffees shall take the profits, and deliver them to the feoffor and his heirs, &c. or that the feoffees shall convey it to the heir of the feoffor at his age of twenty-one years: and where lands are conveyed to certain uses expressed and declared, and there be other secret uses and intents agreed upon between the parties; these uses or trusts are not within this statute, neither will the statute execute them, but they remain as they were before the statute, determinable in chancery. Also leases for years of lands in use, that have their being before, and are granted over in use, are not executed by this statute: and therefore if a lessee for years of land, grant or assign over his estate to A. and B. and their assigns, to the use of the grantor and his wife for the term of their lives; this use or trust is out of this statute, and not executed thereby; and therefore in this case all the estate is in A. and B. and the grantor hath nothing but a use, for which he hath his remedy in chancery: So if one be seised of land in fee, and he bargain and sell it, or make a lease of it to another in trust, and for the benefit of a third person; this is but a chancery trust, &c. in this third person, as was held clearly, *M. 8. Car. B. R.* And yet if a feoffment be made to the use of I. S. and his assigns for the term of twenty years; this term of years shall be executed by the statute: and so in all such like cases and questions of trust, and uses that are not within the statute of uses, the law is now as it was before the same statute was made, and all those matters are determinable in chancery: for as the questions of uses and trusts, that are within the statute, are to be decided and ruled by the judges of the common law, so are all other questions of uses and trusts, that are out of the statute, to be ruled and decided by the judges of the chancery (1).

Dier 369.  
356.  
Cromp. Jur.  
65.

To

(1) It seems to have been the evident intention of the legislature, when they made the statute 27 Hen. 8. c. 10. to abolish uses, by transferring the possession to the use; but the strict construction of that statute defeated the intent of it, and gave rise to trusts of lands, which are of the same nature as uses were before the statute; so that as Lord Hardwicke observed, in 1 *Atk.* 591. *A statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect, than to add, at most, three words to a conveyance.*—There are three direct modes of creating a trust estate. 1<sup>st</sup>. Where a man seised in fee, raises a term for years, and limits it in trust for A. &c. for this the statute cannot execute; the term not being seised.—2<sup>dly</sup>. Where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use.—3<sup>dly</sup>. Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them, to answer these purposes. 1 *Ab. Eq.* 383.—Trust estates may also arise by implication in two several ways. 1<sup>st</sup>. Where a conveyance has been taken in the name of one man, and the purchase-money paid by another; or 2<sup>dly</sup>. Where the owner of an estate has made a voluntary conveyance of it, and made a declaration of trust as to one part of the estate, and has been silent as to the other part of it. These are said to be the only two instances of trusts that have been allowed to arise by operation of law, since the statute of frauds; unless where there has been a plain and express fraud in gaining a conveyance from another, which may be a reason for making the grantee in that conveyance to be considered merely as a trustee.—See *Lloyd v. Spillit*, *Barnard.* 38a.—Trust estates are to be governed by the same rules, and are within the same reason, as legal estates (1 *P. Wms.* 109) and if there were not the same rule of property in all courts, things would be at sea, and there would be the utmost uncertainty (2 *P. Wms.* 713.)—And Mr. Justice Blackstone (2 *Comm.* 337.) upon this subject, says, “courts of equity consider a trust estate (either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity which the other is subject to in law.—The trustee is considered as merely the instrument of conveyance, and can in no other shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice, which, as *cestui que use* is generally in possession of the land, is a thing that can rarely happen.—The trust will descend, may be aliened, is liable to debts, for forfeiture, to leases and other incumbrances, may even to the curtesy of the husband, as if it was an estate at law.—It has not yet indeed been subject to dower, more from a cautious adherence to some holy precedents, than from any well-grounded principle.—It hath also been held not liable to escheat to the Lord, in consequence of attainder or want of heirs, because the

*Colles v. Trecothick* & *Sir. Sm.* on the necessary identity of intent of a trustee and his cestui que trust.

*Sullivan v. Shadling*, 2 *Wils.* 208. *Nil habuit in us plen*

8 *TR.* 489. *Locke v. Lock*, 5 *TR.* 45. *Rennie v. Robt. Sm.* 1 *King* 177

2 Jan. 109  
*deister v. Bagg*  
*Broughton v. Langley*  
*where that Bagg*  
*to A.B.*  
*in trust to permit*  
*to receive the*  
*rents*—in a use  
*executed*  
*But in trust to*  
*pay to the use*  
*is otherwise*  
*Guth v. Baldwin*  
*2 Wils. 208*  
\* P. 507.  
*Whitton v*  
*Laichman*  
*1 P. W.*  
*Doe v. Martin*  
*4 TR. 62*

Ch  
Co. 1  
Lit. 2  
Plow

Dier 1

Co. 6.  
Dier 1  
Co. 2.  
7. 40.  
93. 4.  
See Ba  
and Sa  
Co. 2.  
8. 94.

Cromp.  
61, 60.  
Plow. 3  
308.  
and the  
ter opin  
of the Ju  
in Corb  
case.  
38 Eliz.

“trust  
32 Geo.  
assurance  
have had  
fore a fin  
in barrin  
estate—

(1) Si

A since  
B. on  
Nelson  
Sien.

Co. super  
Lit. 271.  
Plow. 301.

To make a good use, or to make a use to rise, especially such a use as may be within the statute, respect must be had to divers things. 1. To the ways or means of creating and raising of uses, wherein is to be observed, that albeit the quality of the uses be changed in most cases by the statute of uses, yet uses, and uses within this statute, are and may be raised, as they might before the statute, either by transmutation of the estate, as by fine, feoffment, common recovery, &c. or out of the estate of the owner of the land, as by bargain and sale, by deed indented and inrolled, or by covenant to stand seised to uses upon good consideration: and therefore a fine, feoffment, or recovery may be had of land to the use and intent, that either of the parties thereunto or others shall have it for any time or estate; and by this means what uses and consequently what estates a man will, may be raised and created: and in these cases the consor, feoffor, or recoverer, may appoint the use of the same fine, feoffment, or recovery to whom he will, without any respect of marriage, money, kindred, or the like; for

4. What shall be said a good use of land, or not; and when and where such a use shall be raised, altered or created; or not.

First, in respect of the manner of raising it, and the several ways whereby uses may be raised.

Dier 186.

Co. 6. 68.

Dier 155.

Co. 2. 36.

7. 40. 8.

93. 4. 17.

See Bargain

and Sale.

Co. 2. 35.

8. 94.

in this case, his will guideth the equity of the estate: or if a man make a lease to *A.* for life, to the use of *B.* for life; this is a good use and estate in *B.* during the life of *A.*: or if a man by bargain and sale for good consideration sell his land to another; hereby the use will rise according to the estate bargained and sold unto the bargainee; but in this case, if it be an estate of freehold, as of fee-simple, fee-tail, or for life, that is sold; the bargain and sale must be made by deed indented and inrolled within six months after (1), in some of the courts at *Westminster*, or in the sessions rolls of the shire where the land lieth, (except it be in cities and corporate towns where they use to inroll deeds,) otherwise no use will rise by it: but if it be an estate or term for years only that is sold, there the use will rise well enough without any such matter: or if a man seised of land in fee, covenant to stand seised of it to the use of his wife, children, brethren, or other kinsfolk for *life*, in fee-simple, or fee-tail; or if one seised of land in fee-simple covenant to stand seised of it to the use of a woman he is to marry; or to the use of a woman, his son, or other kinsman is to marry, or the like; hereby the uses and consequently the estates will rise accordingly. And in these cases there is no need it should be by deed indented, &c. or that the deed be inrolled; for uses may be raised by deed poll as well as by deed indented. Also uses may be created (as some hold) by word or parol agreement as well as by deed or writing: for it is said it hath been adjudged, that if a man say to his son, and a woman that his son is to marry, that in consideration of the same marriage they shall have the land to them two in tail; that hereby a good estate tail will arise after the marriage: and that where one doth by word without deed grant to his son and to his wife in tail land in consideration of their marriage, that it was agreed by all the judges that the use did rise upon this agreement. Howsoever it is most safe in these cases to do it by deed and in

\* P. 508.

Crompt. Jur.

61, 60.

Plow. 301.

308.

and the bet-

ter opinion

of the judges

in Corbin's

case.

38 Eliz.

"trust could never be intended for his benefit."—*Hardr.* 494.—*Burgess and Wheate*, in *Chancery Hill* 32 *Geo.* 2.—To this may be added, that it is said to be a general rule, that any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation on the trust estate, as it should have had upon the estate at law in case the trustees had executed the trust (2 *Ch. Ca.* 78.)—And therefore a fine or recovery levied or suffered by a *cestui que trust* of an estate-tail, shall have the same effect in barring the issue in tail and remainders, as if the *cestui que trust* had been actually seised of the legal estate—*Ch. Ca.* 49.—1 *Pr. Wms.* 91.

(1) Six Lunar months—see before, p. 231.

*A seised in fee mortgages in fee to B. & then leaves to C.  
B. covenants C. to pay him the rent  
Richard v. Gony 2 Bough. 54  
Stur v. Bousley 2 Bough. 94*



writing; for *Dier* 296. *Plow.* 22. seems to oppugn this (1). And if a man make a feoffment, levy a fine, or suffer a recovery, to the use of his last will, or to the intent to perform his last will, or to the use of such person and persons, and of such estate and estates as he shall limit by his last will, and then afterwards by his last will declare the uses; these are good uses, and this is a good way of raising of uses. So if a man devise his land by will to *I. S.* and his heirs to the use of *I. D.* and heirs; it seems that the use will rise to *I. D.* and his heirs by this means. And if a man by a verbal agreement, in consideration of money or the like, sell his land to another, or agree and promise that the bargainee shall have it for any time, howsoever that hereby no use nor estate will arise (if it be a freehold that is sold) within the statute, because it is not by deed indented, &c. yet it seems a good use will arise at the common law, and that the bargainee shall have relief in equity for his purchase. The second thing whereunto respect must be had, is to the person intrusted, or to him to whom the conveyance is made: for to every good use there must be a person seised to use, and he must be a person capable of such a seisin. And for this it must be known that any sole person that may take an estate to himself may make an estate to other uses. Also a man may be seised of his own land to other uses, as in the case of a covenant to stand seised to uses. But the King, or any body corporate (2), alien born, or person attaint, cannot be seised to other uses no more by an original feoffment to use, than when they come by the land in use at the second hand; in which case, (as hath been shewed) neither such persons, nor disseisors, abators or intruders, or Lords of villains, or by escheats, shall be seised to other \* uses; but in all these cases the uses are void, and the parties shall hold the land to their own uses, or to the uses of the feoffors, &c. and not to the use of *cestuy que use*. And a bargainee of land for valuable consideration cannot be seised of the land to any other use but his own (3). The third thing to be respected is the *cestuy que use*; for to every good use, as there must be a person seised to use, so there must be a person to whose use he is seised, and he must be capable also. And for this it must be observed that any man that is capable of an estate directly and immediately to himself, is capable of the same estate by way of use: but if the use be limited to a corporation, there must be a licence had; otherwise it will be an alienation in mortmain. And if future uses upon contingencies be limited to such persons as are not in being, these uses howsoever they are good at the common law, yet they are not good within the statute; neither doth the statute execute them at all, until they come in possession. And if a feoffment be made to *I. S.* and his heirs to the use of the parishioners of *Dale*; this use is void, for they are incapable by this name; and it shall be to the use of the feoffor. The fourth thing to be regarded, is the estate of him that doth raise the use in the land whereof the use is raised; for howsoever the tenant in fee-simple of land may create what uses he will in fee, for life, or years upon

Conscience. Secondly, in respect of the persons trusted, and what persons may not be seised to the use of another, but to their own use.

\* P. 509.

Thirdly, in respect of the persons for whom the trust is, or the *cestuy que use*.

Fourthly, in respect of the estate and possession of him that doth create the use.

Lit. sect. 462, 463. Co. 6. 17.

See the Stat. 27 H. 8. of Uses. Fitz. De Use. 22. Dier 229.

Co. 1. 122. 127. 135. Plow. 238. Dier 8. 283.

Resolved in Doctor Atkin's case case 44. Q. Co. B.

Dier 155. Lit. sect. 60.

Bro. Mortmain 37.

See before.

12 H. 7. 27. 49 Ed. 3. 4.

(1) See the statute 29 Car. 2. c. 3. which makes a writing necessary.

(2) The reason why neither the King nor a corporation can be seised to uses, is because an attachment does not lie against them out of chancery: see *Plow.* 555.—*Jenk. Cent.* 5. case 1.—*Co. Lit.* 19. b. 13th edit. and note 3 thereunto.

(3) See more amply what persons may be seised to an use, in *Bac. Abr.* Uses (E. 1.)—*Fin. Abr.* Uses (C)

- it, and such uses are good; and the tenant in tail, or for life may perhaps grant their land for their own lives to the use of a third person; yet if a tenant in tail for good considerations covenant to stand seised to the use of himself for life, and after of his eldest son in tail; no use will rise by this covenant. So if tenant in tail of an advowson in gross grant it by deed to one and his heirs to the use of himself for life, and after to the use of another in fee; this grant is void by the death of the tenant in tail. And if such a tenant in tail bargain and sell his land by deed indented and inrolled; hereby the bargainee hath an estate descendible to his heirs, but determinable upon the death of the tenant in tail.
- Hil. 38. Eliz. C. B. Curia. Co. 2. 52. Pasche 13. Jac. C. B. Seigneur Say versus Smith. Co. 10. 96. Yelverton's case 37. Q. B. R.
- And if one covenant by indenture to stand seised to the use of *B.* of *White-acre* which he hath not then, but he doth afterwards purchase it; by this no use will rise. And if one that hath but a term of years grant it to *I. S.* to the use of himself for life, &c. this is no good use within the statute, but a chan- cery trust only. The fifth thing to be respected, is the estate of him that doth take by the conveyance out of which the uses are derived: for howsoever where a man doth grant a fee-simple to another and his heirs, he may limit what uses he will upon this estate; and if a man make an estate for life to another, he may limit an use thereupon; yet if a man make a gift in tail to another, he can limit no use thereupon. And therefore if one grant his land to *I. S.* \* and the heirs of his body, to the use of *I. S.* and his heirs in fee, this limitation of use is void, and *I. S.* hath hereby an estate in tail. And if a feoffment be made to *I. S.* to have and to hold unto him and the heirs of his body, to the use of him his heirs and assigns for ever; this use is void. And where one doth bargain and sell land for money, (in which case the law doth make an expresse use,) no other use can be appointed. And therefore if *A.* for money bargain and sell land to *B.* and his heirs, to the use of *A.* for life, and after of *B.* in tail, and after of *A.* in fee; all these uses are void, for a use cannot rise out of a use. So if *A.* make a lease to *B.* for years rendring rent, to have and to hold to the use of the lessor; this use is void as being against reason also. And if a feoffee to use, before the statute of uses, had bargained and sold the land to one who had notice of the former use, no use had been made hereby: for there might not be two uses in being of the same land at one time. And if *A.* enfeoff *B.* to the use of *C.* and his heirs, with proviso that if *D.* pay to *C.* one hundred pounds, that *C.* and his heirs shall stand seised to the use of *D.* and his heirs, this last use is void; for the use must arise out of the estate of the feoffee, and not out of the estate of the *cestuy que use*. The sixth thing whereunto re- spect must be had, is the cause or consideration: For howsoever in cases where uses pass by way of transmutation of possession, as by fine, feoffment, or recovery, there the consideration is not at all material; for he that doth make the estate, may appoint the use to whom he will without any respect to marriage, kindred, money or other thing; for in this case his own will and consideration guideth the use and equity of the estate; yet in bargains and sales, and covenants to stand seised to uses, it is otherwise: for there consideration is so necessary that nothing will pass, neither will any use rise without a consideration, *i. e.* some matter that may be a cause or occasion meritorious, which amounteth to a mutual
- Fifthly, in respect of the estate and possession of him that doth take by the conveyance. \* P. 510.
- Sixthly, in respect of the cause or consideration of it; and what shall be a sufficient consideration to raise or alter a use, or not.
- Trin. 14. Jac. B. R. Adjudged Couper and Franklin's case. Dier 169. Cromp. Jur. 53. Lit. Sect. 284. Dier 255. Co. 1. 136. 37. Co. 1. 176. Dier 169. Cromp. Jur. 62.

mutual recompence in deed or in law; which must be expressed or implied in the deed whereby the use is created, or else supplied by averment and proof (1). For howsoever in this case an averment shall not be allowed and taken against a deed, that there was no consideration given, when there is an express consideration upon the deed; yet when the deed expresseth no consideration, or saith [for divers good considerations] or the like, there an averment of a good consideration given shall be received; for this is an averment that may stand with the deed; and without consideration inrolment will not help. And therefore if one bargain and sell his land to another by deed indented and inrolled without any consideration; it seems no use will rise by this to the bargainee. So if one [for divers good causes and considerations, or for divers great and valuable considerations] bargain and sell his land to another, or covenant to stand seized of his land to the use of another, that is not of his kindred; no use will rise by this, unless it be proved that money or something else was given for it. But if a man by deed in consideration of money, [as, in consideration of the sum of one hundred pounds to him paid, or in consideration of a competent sum of money to him paid, or otherwise promised to be paid, or in consideration of other land, or of giving of counsel, or the like] bargain and sell, or by such like words grant his land to another in fee-simple, fee-tail, for life, or years; in these cases, the use will arise to the bargainee well enough. And therefore if I covenant with *B.* that when he doth enfeof me of *White-acre*, I will stand seized of *Black-acre* to the use of him and his heirs, and he doth enfeof me accordingly; in this case, the use of *Black-acre* will rise to *B.* and he and his heirs shall have it according to the agreement. So if I agree with my lessee for years, that if he pay me one hundred pounds, within his term, that I will stand seized of the land to the use of him and his heirs, and he do pay me the one hundred pounds accordingly; in this case, the use will rise, and he and his heirs shall have it according to the agreement. So if I covenant that my son shall marry the daughter of *A.* and *A.* promise to give me a hundred pounds for the marriage portion, and I covenant that if the same marriage do not take effect, I and my heirs will stand seized of the land to the use of *A.* and his heirs until the one hundred pounds be paid; in this case, a good use will rise of the land accordingly, if the marriage do not take effect: but in all these and such like cases the covenant must be by deed indented, and it must be inrolled; otherwise no uses will arise. And when the deed is inrolled, it shall take effect as from the beginning by relation, to avoid all intervenient estates and charges whatsoever. And in like manner it is if one for no cause, or for no consideration, [as, because he is of his ancient acquaintance; or because there hath been intire love or great familiarity between them; or because he hath been his chamber-fellow, school-fellow, or fellow-servant; or because he hath done him good service; or because he was his master and taught him; or to the end that he may pay his debts and legacies and discharge his funerals; or for

Averment.

\* P. 511.

Relation.

Dier 146.

Co. 1. 176.

11. 25. Dier

312.

Plow. 301.

Bro. Fait.

Inrol. 9.

Doct. &amp;

St. 99.

Crompt. Jur.

60. 61. Dier

90.

Crompt. Jur.

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Bro. Expo-

sition of

words 44.

Plow. 302.

21 H. 7. 20.

Dier 37

Co. 7. 1

10. 143

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sect. 28.

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uses 54.

Curia T

10 Car.

R. Hoff

case.

Co. 7.

11. 2

Dier 3

Further as to the consideration necessary to create a use, in 2 *Bl. Com.* 330.—*Gilb.* 84.—*Bacon's* *ante* 161.—*Bac. Abr.* Uses, &c. (E. 2.).



divers good causes and considerations;] if one, for any of these or any such like causes and considerations, covenant with another that he will stand seized of his land to the use of that other and his heirs, or that he and his heirs shall have the land, &c. by this covenant, whether it be inrolled or not, no use at all will rise. So if one covenant to stand seized to the use of *I. S.* (who is his bastard son) and his heirs; no use will arise hereby: and yet perhaps upon such a covenant as this, whereupon no use nor estate doth arise, an action of covenant may lie. But if one [in consideration of nature, kindred, blood, or marriage, with one's self, or any of his blood, payment of debts, or for the like cause] or without any such express consideration at all, \* covenant to stand seized to the use of himself, his wife, children, brothers, sisters, or cousins, or their wives; these are good considerations, and the uses and estates thereupon thus raised and made, are good: and therefore if one covenant by his deed, without expression of any consideration, to stand seized of his land to the use of himself for life, and after of his wife for life, and after of his child in tail, or for life, and after of his brother in tail, or for life, or in fee, or in any such like manner; these uses will rise, and the estates will be well made hereby accordingly. So if I agree with another, that if he marry my daughter, from the time of the marriage they shall have my land to them and their heirs; in this case and by this agreement, if he do marry my daughter, they will have my land according to the agreement: so if I, being about to marry with a woman, covenant with *I. S.* to stand seized of my land to the use of myself for life, and after to the use of the woman I am to marry for her life, and after to the use of the heirs of my body begotten on her; these are good uses and estates that are made by this covenant: but here, by the way, this difference must be observed, where a man doth covenant, in consideration of a marriage to be had, to stand seized to an use, and the marriage doth not take effect, there no use shall arise: so also if the parties disagree at their age of consent: and so was it held in the lord *Herbert's* case: but where one doth covenant to make a feoffment, or levy a fine to such uses, and the feoffment is made, or fine levied accordingly, there notwithstanding the marriage doth not take effect, yet the use shall arise: for there he is in by the fine or feoffment, in which case there needs no consideration. And therefore if *A.* covenant with *B.* that in consideration *C.* is his kinsman, and in consideration of a marriage to be had between *C.* and *E.* he will make a feoffment and other assurances to the use of himself for life, the remainder to *C.* and *E.* and the heirs of their two bodies, and after assurances are made accordingly by fine or feoffment, but they do not intermarry, but marry others; in this case notwithstanding, *E.* shall have a moiety of the land. So if I covenant (in consideration of the love I bear to my wife) to stand seized to the use of her and the heirs of my body upon her begotten, and after to the use of my brother; hereby the use will rise to my brother also, albeit he be not within the express consideration. So if one covenant with his two sons, for the love he doth bear to them, to stand seized of his land to the use of himself for life, and after of his wife for life, and after of

Dier 374.

Co. 7. 11.

10. 143. 1.

83. Plow.

301. Lit.

sect. 284.

Co. 1. 154.

Plow. 301.

Bro. feoff-

ment al.

uses 54.

Curia Trin.

10 Car. B.

R. Hoskin's

case.

Co. 7. 40.

11. 24.

Dier 374.

Covenant.

\* P. 512.

\* P. 513.

Inrolment.

\* P. 514.

Seventhly,  
in respect of  
the manner  
and frame of  
the words  
used in the  
raising of  
uses; and  
what man-  
ner of uses  
may be  
made, or  
not.

of his two sons in tail one after another; in this case, the consideration is sufficient to raise the use to the husband and wife also. So if one (in consideration of the love he doth bear to his brother) doth covenant to stand \* seized to the use of his brother, and the wife of his brother for life, or in tail; in this case, the consideration is sufficient to raise the uses to them both. So if I covenant (in consideration of the marriage of my son with the daughter of another) to stand seized to the use of myself for life, and after of my son and his wife in tail; these are good uses and will rise accordingly. If I covenant with *I. S.* to stand seized to the use of him, his executors, &c. (he being none of my kindred) for twenty years, and after to the use of my son in tail; in this case, the use will not rise to *I. S.* but it will rise to my son well enough. For albeit the consideration of money given by one, may be a consideration to all the estates; yet the consideration of blood, &c. is singular, and will raise the use of that only to which it goeth: but if I covenant with *B.* in consideration of the marriage of my son with the daughter of *B.* to stand seized to the use of *R.* (a stranger) for life, and after to the use of my son and his wife in tail; in this case, the use shall rise to *R.* albeit he be a stranger, and that for the supportance of the remainder, which cannot be without a particular estate: and in all these and such like cases, no inrolment of the deed is necessary. If I (in consideration of ten pounds given to me by my son) covenant with him to stand seized of land to the use of him and his heirs; in this case, no use will rise without inrolment by the implied consideration, because there is an express consideration, *et expressum facit cessare tacitum*. And yet if I covenant, in consideration that *I. S.* is my son and hath paid me ten pounds, that I will stand seized of land to the use of him and his heirs; in this case, the use will arise without inrolment. And if I covenant in consideration of one hundred pounds, and of a marriage, to stand seized to the use of myself for life, and after of my son in tail; hereby the use is raised, and the possession charged without inrolment. So also where a feoffment is made, fine levied, or recovery suffered, and no use declared thereupon; and the same is without any consideration of fine or rent; by this the use is not changed, for it doth result to the feoffor, conusor, or recoverer, and he hath the estate as he had it before: but if, in these and such like cases, there be but a penny or a pennyworth of consideration given, or any rent reserved upon the feoffment, the use will rise well enough to the feoffee, &c. and if any tenure be created, as where a gift in tail, lease for life, or years, is made; in these cases, albeit there be no consideration given, yet the use will rise well enough to the donee or lessee, and especially, if any rent be reserved, for that is a kind of consideration: but if a lessee for years grant over his term to another without any consideration at all, it seems by this no use at all will rise to the grantee, and therefore the grantee shall hold it to \* the use of the grantor; *sed quere*. The seventh thing whereunto respect is to be had, is the manner and form of words used in the making and raising of uses, wherein there is much regard to the mind and intention of parties: for if one covenant

Plow. 307.

Plow. 307.  
Dier 174.Co. 12. 24.  
25. 7. 40.Manrel's  
case.  
Trin. 3 Jac.  
B. R. Bro.  
Feoffment  
al. use 15.Co. 1. 24.  
Doct. & St.  
97. 99. 101.Co. 2. in  
Sir Rowla  
Hayward  
case. War  
versus La  
bert. C. 1  
Paich. 37Resolved  
Stiles case  
37 Eliz.21 H. 7.  
Plow. 307.  
301.  
Bro. feoff  
ment all  
use 16.

Dier 374.

Co. 1. 12

(1) If  
in 1 Co. C  
Buckley v  
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in consideration of twenty pounds paid him by *I. S.* to stand seized of land to the use of *I. S.* and his heirs; or if one covenant that *I. S.* and his heirs shall have his land; if this deed be inrolled, this is a good bargain and sale to raise the use, and will do it as well as when it is made by the words [*bargain and sell.*]

Co. 8. 94. So if one, for good consideration, by words of demise and grant, make a lease of his land for a term of years; hereby the use will rise to the lessee, as well as if the lease were made by the words, *bargain and sell: et sic de similibus.* And yet if one, by words of *bargain and sell,* convey his land to his son; no use will arise by this, except there be money paid, and the deed be inrolled. *Inrolment.*

Co. 2. in Sir Rowland Hayward's case. Wards versus Lambert. C. B. Pasch. 37 E. And if one, in consideration of money, grant his land to his son, or any other, by the word [*enfeoff*]; no use will rise by this, unless livery of seisin be made thereupon; because the intent of the party in these cases doth appear to be to pass it in another manner; and if in the last case livery of seisin be made, then the use shall be guided by law; that is, if nothing be given, it shall be to the use of the feoffor, and not amount to a limitation of use to the son. If one covenant with his son, that his land shall remain, or that his land shall descend to him; this is a good covenant to raise the use according to the limitation. And yet if one covenant with his son upon his marriage, that his land shall remain, revert, or descend to his son in fee, or in fee-tail; by this no use will be raised, because it is so uncertain; but perhaps this may amount to a covenant, whereupon the son may have an action of covenant (1). If I covenant for me and my heirs, that I and my heirs, and all others that are seized of my lands, shall be thereof seized to the use of *Ec.* this is a good covenant to raise the use, albeit it be in words of the future tense. If I covenant with my eldest son, and strangers, to convey my land to the same strangers to the use of myself for life, and after of my son in tail, *Ec.* and I grant by the deed, that the said persons seized of the said land, shall be from thence seized to the said uses, and none other use, and no other conveyance is made; it seems this is sufficient to raise the use: and yet if I be seized of land in fee, and covenant with *I. S.* that *A. B.* and *C. D.* and their heirs, shall stand and be seized of this land to the use of *Ec.* it seems, this is not a good covenant to raise the uses. If a feoffment or other conveyance be made to the use of the feoffor and the heirs of his body, begotten on the body of *M.* the wife of *S. T.* and for default of such issue, to the use of him and the heirs of his body, begotten of *S.* the now wife of *W. K.* and for default of such issue, then to the use and performance of \* his last will, for \* P. 515. ten years immediately after his death, and after the term ended, to the use of the feoffees and their heirs during the life of *W.* (eldest son of the feoffor (and after his death to the use of the first issue male of the body of the feoffor lawfully begotten, and the heirs

(1) If I covenant that my son shall have my land, this was held good by reason of the word *covenant*, in *1 Co. Chudleigh's* case, and was cited out of *Symour's* case, in *Dyer* 96.—But *Hobart* Chief Justice, (in *Buckley v. Simmonds*, *Winch.* 61.) denied this; and *Bridgman* Chief Justice agreed with *Hobart's* opinion, that it wanted consideration. But, *per Bridgeman*, if I will that my son shall have my land in consideration of marriage, tho' the word *covenant* is wanting, yet the use is well raised. *Sid.* 26.



of the body of such first issue male, and for default of such first issue male to the second issue male, &c. [in the same manner;] these are good limitations of uses. So if a use be limited to *I. S.* Co. 1. 92. for life without impeachment of waste, and after to the use of *B.* and *C.* their executors and administrators for the term of twenty years, and after to the use of *C.* and the heirs male of his body, &c. these are good uses. So if a use be limited after this manner, viz. to the use of a man's last will and testament, or to the use of such person or persons and of such estate and estates as he shall limit and appoint by his last will and testament; or to the use of such person and persons, or to such uses and purposes as he shall by any writing under his hand and seal declare and appoint; these are good limitations. If I covenant with another, in consideration of blood, &c. that I will stand seized of my land to the use of such of my sons, or such of my cousins, as the covenantee shall name; in this case, after a nomination made, the use will rise well enough. But if I (for and in consideration of ten pounds or the like good consideration) covenant to stand seized of land to the use of such persons as the covenantee shall name; in this case, albeit the covenantee do nominate some of my cousins, or blood, yet no use will rise by this for the uncertainty of it. If a feoffment or other conveyance be to the use of *I. S.* and his heirs, provided that if the feoffor pay ten pounds at such a day, that then it shall be to the use of the feoffor and his heirs; this is a good limitation, and the use will rise accordingly. A use may be limited to a woman *durante viduitate sua*, and this is good.

Uncertainty.

If a man be seized of two manors, and covenants to stand seized of the same to the uses following, viz. of the one to the uses of the covenantor for his life, and after to the use of his wife for life, and after to the use of his eldest son in tail, &c. and of the other manor, to the use of his second son in tail, &c. these are good limitations, and the uses will rise accordingly.

If a man seized of land in fee, agree with another, that a fine shall be levied of it, and that the same shall be to the uses following, viz. that *I. S.* (the conusor) shall have one yearly rent of fifty pounds during his life to be issuing out of the same land, and as touching the land charged with the rent, &c. to the use of *I. D.* (the contee) until default of payment of the said yearly rent, and then to the use of *I. S.* and his heirs for ever; this is a good limitation and the use will rise accordingly; *et sic de similibus*.

- \* P. 516. If a feoffment be made by *I. S.* to the uses in certain indentures \* tripartite of the same date, and therein is declared that it shall be to the use of *A.* for life without impeachment of waste, and after to the use of such farmers, or tenants, to whom he shall demise any part of the premises for life, or lives, or for any terms of years, as in any such demise shall be limited and appointed, and after to the use of the performance of the last will of the said *A.* and to the use of such person or persons severally to whom the said *A.* by his last will and testament shall appoint any estate, and after to the use

use of, &c. these are good uses, and the estates shall rise accordingly.

Co. 4. 11. A use may be limited upon condition, and the condition may be annexed to one of the uses, and not unto another.

Co. super Lit. 19. If lands be conveyed to *I. S.* and the heirs of his body, to the use of *I. S.* and his heirs, or to the use of a stranger and his heirs; this use will not rise in this manner (1). Yet if lands be conveyed to *I. S.* and his heirs, to the use of him and the heirs male of his body and after to the use of a stranger and his heirs; it seems this is a good limitation.

Hil. 6 Car. B. R. Ad-judge. If one grant lands by deed to husband and wife, to have and to hold to the use of the husband and wife and of the heirs of their two bodies; this is a good estate tail by this limitation, albeit he do not say *habendum* to them and their heirs, &c. but *habendum* to their uses; but otherwise it were if the use were limited to a stranger in this manner.

Dier 314. If lands be conveyed by *I. S.* to *I. D.* to the use of *I. S.* or to the use of his wife for life, or to the use of another for life, the remainder to another in tail or for life, the remainder to a third, his executors, &c. for six months, and after the six months ended, to the use of a fourth and his heirs; these are good limitations, and the estates will rise accordingly.

Dier 290. If a use be limited to the donee of a fine, or to a recoverer in a recovery, until he make a lease for forty years, and after to the use of the recoverees or donees and their heirs; this is a good limitation, and the use will rise accordingly (2).

Co. 1. in Chudleigh's case 135. Contingent uses, or uses in *posse*, may be created as well as uses in *esse*; and therefore if lands be conveyed to the use of a man and the wife he shall afterwards marry, or to the use of his first, second, or third wife; or to the use of *I. S.* for life, and after to the use of the right heirs of *I. D.* and *I. D.* is then living; or to the use of *I. S.* for life, and after to the use of him that shall be his first heir male, and the heirs of the body of such heir male, &c. all these, and such like, are good uses; but they are uses at the common law still, and are not executed by the statute until they come in *esse*. The last thing whereunto respect is to be had, is the nature and quality of the use: and herein it is to be known, that a man may \* at this day by act executed in his life time, or by his last will and testament at his death, give his lands, tenements

Eighthly, in respect of the nature and quality of the use.

Co. 1. 26. S. 131. 4. 113. or hereditaments, to any person or persons not corporate, and their heirs, for any religious, charitable, or civil use, as well as for any private use: and therefore a man may so dispose of his lands for the finding of a preacher, erecting or maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparations of churches, high-ways, bridges, discharging of the poor inhabitants of a village of the common charges, to make a stock for poor labourers in husbandry, and poor apprentices, and for the

\* P. 517. Charitable uses.

(1) A tenant in tail cannot be seized to any use expressed; for the *St. of Westm. 2. ch. 1. de donis* has so appropriated and fixed the estate tail that neither the donee nor his issue can execute this use. — *Jenk. Cent. 5. ca' 1.*

(2) See further by what words uses may be created, in *Vin. Abr. uses. (E. 4.)* — *Gilb. on Uses 60.* marriage

Superstitious uses.

marriage of poor virgins, or other such like uses, and these uses are not prohibited by any statute: and it is good policy, upon every such feoffment or estate to reserve to the feoffor and his heirs some small rent, or to set down some small consideration: but these uses are not such uses as are executed by the statute of uses, neither are they to be resembled to the uses aforesaid; for in this case, if there be any mis-employment of the lands, or breach of the trust by the parties trusted, redress is to be had of the lord chancellor or lord keeper by a special course of proceeding. For which, see the statutes of 39 Eliz. c. 6. 43 Eliz. c. 9. 7 Jac. c. 3. (1). But if any man have heretofore given, or hereafter shall give, any lands, tenements or hereditaments, by act executed in his life, or by his Stat. 15 R. 3. last will at his death, to any person singular or corporate, in fee- c. 5. 37 H. 8. simple, fee-tail, for life, or years, to the intent or upon condition c. 4. 1 Ed. 6. c. 14. to maintain any superstitious use, as to find a chaplain, and have the service of a priest to say mass, or to have a priest or other man to pray for the soul of any dead man in such a church or other place, or to have or maintain perpetual obites, lamps, or torches, &c. to be used at certain times, to help to save souls out of the supposed purgatory; all these and such like uses are void; and the lands that are so given to such superstitious uses are to be forfeited, and given to the king, and he shall have them; and yet if there be any charitable use intermixed with the superstitious use, and they may be distinguished, the King shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also: for which, see *Adams and Lambert's case* at large, Co. 4. 104. (2).

5. Declaration of uses: and where a use of land may be declared upon any assurance, and what shall be a sufficient declaration of such use, or not. As touching the declaration of uses, i. e. the manifestation or agreement of the parties, to what uses and intents the assurance made shall be, these things are to be known: 1. that uses may be declared or averred on a fine, feoffment, or recovery of land; but on a bargain and sale of land, no use may be declared or averred, but what the law doth make. And upon a covenant of uses, no other use may be declared or averred, but what is contained \* within the deed. 2. Every one may declare and dispose the use of land according to the estate that he hath in the land; for the declaration and disposition of the use doth ensue the ownership of the land, *sicut umbra sequitur corpus*. And at this day the use doth draw the land to it, as the body or principal doth, the shadow or accessory: and therefore the owner of the land, or he from whom the land doth move, ought to limit and declare the use of the land; as if the husband and wife levy a fine of the land, whereof he is seised in the right of his wife; the husband alone may declare the use of this fine, and this declaration shall bind the wife, albeit her assent to the limitation of the uses do not appear, if her dissent doth not appear; but in this case, it is most proper to have a declaration of the uses by the husband and wife both; for she alone, because she is *sub potestate viri*, cannot declare or limit any use; neither can the husband alone limit any use against

(1) See fully what devises for charitable purposes are good, in *Duke's law of charitable Uses*, 105, &c. and what shall be a good appointment to a charitable use, in *Com. Dig. Uses*. (N. 11.)—*Chancery* (2 N. 2.)

(2) See further what uses are suppressed as superstitious, in *Com. Dig. Uses*. (M).

her



her good will, because he hath not the estate of the land: and therefore, if *A.* and *B.* his wife be seized of land in the right of his wife, and she, without the consent of her husband, covenant by indenture with *C.* and *D.* 14 *Martii*, 14 *Eliz.* that a fine shall be levied of this land, and that it shall be to the use of herself for life without impeachment of waste, and after to the conusees for their lives, to the intent that they shall suffer *I. S.* to take the profits for his life, with diver remainders over; and afterwards, and before the fine levied, the husband alone by another indenture 21 *February* 22 *Eliz.* (wherein the wife is named a party) without the consent of his wife, doth agree that a fine shall be levied to the use of him and his wife, and after to the uses limited by the wife's indenture, and after the fine is levied accordingly; in this case, albeit the variance be in one particular only, and the limitations in all the rest of the uses and estates do agree, yet all the same limitations by both indentures are void, and the use upon the conveyance is left to construction of law, and therefore shall be to the wife and her heirs for ever: and yet if the husband and wife agree in the limitation of the uses for part of the land, and differ in the rest, the limitations for so much as they agree in are good, and void for the residue: and in these cases, where the declaration is good, the wife and her heirs shall be bound by it. So if two joint-tenants are, and they, or two others having several estates, join in a fine, and one of them declare the use in one manner, and the other doth declare the use in another manner; this declaration is good for either of their parts; for the declaration shall be governed according to their estates. And if an infant, or a man *non sane memoria*, doth declare the use of a fine levied by him, this declaration is good, and shall bind him so long as the fine shall continue in his force

Husband  
and wife.Joint-te-  
nants.

Infant.

- Co. 2. 73. 5. (1). 3. This declaration of uses may be made \* either by deed \* P. 519. indented, (which is the most usual and safe way,) or by deed-poll; as where the parties do by such a writing agree that an assurance passed, or to be passed, shall be to such and such uses; as that a fine shall be levied by such a time, and that it shall be to the use of one for life, of another in tail, and of another in fee. Or it may be made by a verbal agreement without any writing at all; as where an agreement is so had, and made between two or more, that a fine or recovery shall be had, and shall be to such and such uses, and the same is had accordingly; in this case, this is a sufficient declaration, being proved; but it is not safe in these cases to depend upon slippery memory (2). 4. This declaration by word or writing, may be made before, at, or after the time of making the assurance: and therefore one may covenant or agree that *I. S.* shall recover against him, or that he will levy a fine, or make

Co. 2. 69.

70. 6. 27.

63.

Dier 290.

Co. 7. 40.

Co. 9. 8.

Dier 136.

(1) See accordingly *Mansfield's case*, 12 Co. 124.—*Fig. on Rec.* 72.—2 *And.* 163.

(2) But now by statute 29 *Car.* 2. c. 3. All declarations or creations of trust or confidences of any lands tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or else they shall be utterly void, and of no effect.—After the statute of frauds it was doubted, whether it was not necessary to declare the uses of fines or of common recoveries either at, or previous to, the time of levying or suffering thereof; and whether a subsequent declaration of the uses would not have been void; and therefore the statute 4 *Ann.* c. 16. § 15. enacts, that such subsequent declarations of uses shall be good and effectual.—Since the statute of frauds, uses may be declared by writing only without seal. per *Holt Ch. J.*—7 *Mod.* 76.

a feoffment to *I. S.* of such land, and that the same shall be to the use of, &c. And if one make a feoffment, he may declare the uses of it at the same time, and that within the same or in another deed at his pleasure: and if the assurance be past, and no declaration of uses had before, or at the time of passing it, a declaration may be subsequent, *viz.* that the same assurance was and shall be, and recoverors, &c. shall stand and be seised to such and such uses; for an indenture subsequent may direct and declare the uses of a fine or recovery precedent. But herein these diversities are to be observed; when precedent indentures are made to direct the uses of a subsequent assurance, and after the assurance is made

Averment.

accordingly, there no averment shall be taken by word, that the same assurance was to other uses than are declared by the indenture: but against an indenture subsequent, declaring the uses of an assurance precedent, an averment may be taken, that there were other uses expressed and limited, before or at the time of the assurance, than are contained in the indenture. If a precedent indenture be made to direct the uses of a subsequent assurance, when the assurance comes, the land is bound, and the conusor or recoverer cannot by any act of his, after the recovery had, charge or avoid it; but if the declaration be subsequent, if in the interim, between the assurance had, and the declaration of the uses, the conusor or recoverer sell, give, or charge the land to others; this subsequent declaration will not subvert the mean estates, charge or interests; unless it can be otherwise proved, that, by a certain and compleat agreement of the parties, the assurance was had and made to these uses. 5. When the agreement for the limitation of uses is precedent, whether it be by writing or word, it is but directory, and doth not bind the estate, until the same assurance be afterwards had; and therefore by a new agreement or declaration made in

\* P. 520. the same manner as the \* former *viz.* in writing, if the former be so, and between the same parties, either before or at the time of the same assurance passed, new uses may be made and the former uses changed (1): but when the same assurance is pursued accordingly, and no intervenient alteration is made, it shall be expounded to be to the same uses, and shall bind the parties; and no naked averment shall be received of any latter or other agreement contrary to the indentures. 6. The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the lands, &c. of which, and in the estates by which, the uses are declared (2); and if there want certainty in either of these, the declaration is not good; and it must be compleat of itself without any reference to indentures, or other writings to be made afterwards, for then it is but an imperfect communication, and no compleat declaration. 7. Where an indenture precedent is to limit the uses of a subsequent fine or recovery, and is not

(1) And the revocation of the former uses will be good, though it be but by a writing and not by a deed; for where the conveyance enures by way of transmutation, the use is according to the intent of the party; and 'tis no matter how that intent is manifested, so as it may be known, *Jones v. Morley*, *Shaw. Parl. Ca.* 140.—*S. C.* 1 *Salk.* 677. and see the cases in the margin of the last edition of that reporter.

(2) It is not necessary in declaring an use, if there be a transmutation of possession, to use the very word *use*. Any expression whereby the mind of the party may be known, that such a one shall have the land, is sufficient, *per Holt.* 12 *Mod.* 162.

pursued

pursued in some circumstance of time (1), person, quantity, or the like; yet if no other new mean agreement may be proved, the assurance shall be in judgment of law to the uses contained in the same indenture; but if the variance be in these particulars, and the form of the indenture be not pursued, there an averment without writing may be taken, that the fine or other assurance was to other uses than are contained in the indenture: and if none such can be made, then it is left to construction of law (2). And therefore if *A.* be seised of divers manors in fee, and by his indenture dated 10 *Martii*, 21 *Eliz.* doth covenant with *B.* and *C.* that he, before the end of Trinity term next, will by fine, or other conveyance, assure one of these manors to them, and that the same assurance shall be to the use of *A.* and *E.* his wife, and of the heirs of *A.* and the twenty-eighth day the deed is inrolled; and, the twenty-ninth day of the same month, he doth by another indenture covenant with the same *C.* and *D.* to convey all the same manors to the same *C.* and *D.* before the annunciation next, and that the same assurance shall be to the use of *A.* and the heirs male of his body, and for default of such issue, to the use of divers others in remainder, and by this indenture doth covenant, that if he shall not sufficiently convey this land by the day, that he will stand seised to the same uses, &c. and no fine is levied by the end of Trinity term, but, the seventeenth of *September* following, a note of a fine is acknowledged to *B.* and *C.* and the heirs of *B.* of the land within the first indenture; and, the eighteenth of the same month, another note of a fine is acknowledged to *C.* and *D.* of the same and other land in the last indenture, and both these fines are entered in *Offibus Mich.* following; in this case, these fines cannot be directed and declared by both indentures, and therefore it seems the declarations are void (3).

Co. 9. 8.  
5. 20. 25.  
Doct. & St.  
95.  
Co. 2. 57.

As touching averment of uses; *i. e.* the proof of uses by witnesses, these things are to be known; that where any use is expressed upon a charter of feoffment, no other use *contra* or *preter* the use \* which is expressed, shall be admitted. But in cases of fines and recoveries wherein no uses are expressed, other uses than what law-construction will make, may be shewed and proved to be agreed upon; and the same assurances shall be to such uses, as by proof shall be made to appear to be the intent of the parties: as if a man and his wife sell her land for money, and after levy a fine to the vendee and his heirs; in this case, it may be averred it was for money; and this shall carry the use to the vendee without any declaration of use, which otherwise would result to the woman and her heirs: and yet if a fine be with a grant and

6. Averment of uses; and where a use of land may be averred upon any assurance; and what shall be said a sufficient averment, or not.  
\* P. 521.

(1) Where there is an agreement to suffer a recovery, and uses are declared, if the recovery is after suffered, though it varies in point of time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, the recovery will enure to the uses so declared; *per* *Ld. Hardwicke*. 1 *A. k.* 7.

(2) Where the uses of a recovery are declared by deed precedent, no new or other use can be averred by parol, unless there was some variance between the deed and the recovery; and in case of a deed precedent, if the party set up other uses, he must confess and avoid: but where they are by deed subsequent, new or other uses may be averred without shewing the deed, though there be no variance, &c. because there was an intermediate time when there might be such agreement made, and the uses arise by the recovery according to that agreement; and if a deed subsequent be set up, the other may traverse these uses. *Per* *H. l. Ch. J.* in *Tregame v. Fletcher*. 1 *Salk.* 677.

(3) See further as to the doctrine of declaring uses, in the books referred to in the concluding notes to the chapters on fines and recoveries;—and in *Vin. Abr. Uses* (T. 2), &c.



render, no averment to prove it to be to other uses than what are contained in the fine shall be received. And where the uses of a conveyance be declared by indenture before or at the time of the same conveyance, no averment shall be received of any other uses than what are contained in the indenture: but if the indenture of declaration be subsequent, there an averment lieth and shall be received, that there were other uses agreed upon at or before the time of the conveyance made. And where an agreement is made to levy a fine, or suffer a recovery, before or at a time certain, and that it shall be of such and such lands, and to such and such persons; and after it falleth out that the fine, or recovery, is not had by that time, or not of the same land, or not between the same persons; in these cases an averment may be had of other uses and of another agreement (1).

7. To what use an assurance of land shall be by construction of law; and how the limitation of the uses of land by a deed shall be construed.

Where the uses of an assurance are certainly agreed upon and declared between the parties thereunto, there regularly it shall be to such uses as are declared and agreed upon, and to none others. But if a conveyance be made of land by fine, feoffment, or recovery, and no uses thereof declared and agreed upon, the law will limit and appoint the use according to equity and conscience. And therefore if a man levy a fine, make a feoffment, or suffer a recovery of land without any consideration; the law will adjudge the use to be in the feoffor, conusor, or recoverer who doth part with the land: and so if a man make a feoffment to the intent to perform his last will, or to the use of his last will, or to such persons as he shall limit by his last will; in all these cases, the use shall be in the feoffor and his heirs, while he doth live to dispose at his pleasure. And so if one make a feoffment of land to *L. S.* and his heirs, to the use of *W. S.* for twenty years, and limit the use no further; in this case, the residue of the use after the twenty years, shall be to the feoffor and his heirs: but if in these cases there be any consideration of money or the like, though never so little given, or any rent reserved upon the feoffment, the law will adjudge the use in the feoffee, conusee or recoveror: and yet in that case also, if other uses be expressed upon the deed, it seems it shall go to the uses expressed; as if *A.* for twenty pounds paid by

- \* P. 522. \* *B.* enfeoff *B.* and his heirs, to the use of *C.* and his heirs. If the husband and wife levy a fine of the wife's land without consideration and without any declaration of use, the law will adjudge this to be to the use of the wife and her heirs; but if they sell her land for money, and after levy a fine thereof to the vendee; this shall be to the use of the vendee and his heirs. And if a man be seised of land of the part of his mother, and without any consideration make a feoffment in fee of it; this shall be said to be to his use in the same nature he had it before (2). So if two

(1) See further in what cases averments may be made of uses, in *Bac. Abr. Uses* (E. 5.)—*Vin. Abr. Uses* (O. 6.)

(2) The contrary is said in *Hobart* 31.—but the case in *Hob.* is denied to be law (and consequently the passage above supported) by Lord Chancellor *Macclesfield*, who says, that in the cases of *Giddels v. Free-stone*, 3 *Lev.* 406. and in *Abbot v. Burton* in 1 *Salk.* 591, it was solemnly adjudged, that the use, whether expressly declared by the feoffor, or permitted to arise by implication, was the same thing, and would go to the mother's side.—But where a man so seised on the part of his mother, levies a fine *sur done grant et render*, it operates as a feoffment and re-feoffment, and gives a new estate descendible to the heirs general.—*Price v. Langford*, 1 *Salk.* 337.

joint-

joint-tenants be of land, the one in fee-simple, and the other but for life, and they without any consideration levy a fine of it, and make no declaration of uses; the use shall be to them of the same estate as they had before in the land. So if *A* tenant for life of land, and *B*. in reversion or remainder, levy a fine of this land generally, this shall be to the use of *A*. for life, and to the use of *B*. in fee afterwards as it was before. So if *A*. be seised in fee of an acre of ground, and he and *B*. join together and levy a fine of it to another without any consideration; this shall be to the use of *A*. and his heirs only.

Perk. Sect. 533. If one make a gift in tail, or lease for life, or years, albeit it be without any consideration of fine, or rent, yet the law will adjudge the use in the donee, or lessee and not in the donor or lessor.

Plow. 539. If one at this day by deed indented bargain and sell his land to another for money, and doth limit no estate, but the deed is *Habendum* to him only, and not *Habendum* to him and his heirs, or to him and the heirs of his body, or to him for life; howsoever in this case, before the statute of uses was made, it was otherwise, yet now the common received opinion is, that by this there doth pass only an estate for life, and not a fee-simple.

Co. 1. 87. yet see Lit. Bro. 538. Crompt. Jur. 47. 27 H. 8. 6. Co. 1. 110. Co. super Lit. 42. Dier 169. If a feoffment be made to *I. S.* and his heirs, to the use of *I. D.* without any more words; by this limitation *I. D.* hath only an estate for life: so if a feoffment be made to *I. S.* and his heirs, to the use of *I. D.* for ever, without saying [and his heirs:] hereby *I. D.* hath only an estate for life: and so of other uses the construction shall be according to the rules of law.

Pasche 3 Eliz. B. R. the Lord Mordant's case. If a use be limited to *I. S.* and his heirs until *A.* shall come from beyond the sea, and attain his full age or die, in this case, if he come from beyond sea, attain his full age, or die, the use shall cease.

Hil. 17 Jac. B. R. Rigway's case. If one covenant to stand seised to the use of *A.* his eldest son and the heirs male of his body, and after to the use of *B.* his second son in tail in the same manner, or according to the limitation to *A.* by this *B.* hath an estate tail to him and the heirs male of his body.

Co. super Lit. 28. \* If a feoffment in fee be made to the use of a man and his wife \* P. 523. for their lives, and after to the use of their next issue male to be begotten, in tail, and after to the use of the husband and wife, and of the heirs of their two bodies begotten (they having no issue male then;) by this the husband and wife are tenants in special tail executed; and after they have issue male, they are tenants for life, the remainder to the son in tail, the remainder to them in special tail.

Dier 300. If one make a feoffment to the use of himself for life, and after his decease to the use of *Alice* whom he doth intend to marry, until the issue he shall beget of her shall be of the age of twenty-one years, and after the issue cometh to that age, then to the use of the wife during her widowhood, and the husband die without issue; by this the wife shall have an estate at least during her widowhood.

If I covenant with *B.* in consideration that he will marry my daughter, that from the time of the marriage I will stand seised to the use of myself for life, and after to the use of *C.* a stranger and the heirs male of his body, and after to the use of *B.* and my daughter and the heirs of their two bodies; in this case, albeit the use limited to *C.* the stranger be void, yet it

seems *B.* and my daughter shall not have the land till the death of *C.* without issue, but that my heirs shall have it till that time.

If I covenant with *B.* to stand seised to the use of myself for life, Co. 1. 155. and after my death to the use of *C.* a stranger for the term of twenty years, and after the end of the term to the use of my son in tail; in this case, the use limited to *C.* is void, and my son after my death shall have the land: but if the words of the covenant be [and after the end of twenty years] instead of [and after the end of the term] my son shall not have the land until the twenty years be expired (1). See more in exposition of deeds. chap. 5.

8. Where and how uses of land may be extinguished and destroyed, or suspended or not; and where the ancient uses shall be revived by the entry of the feoffees, or not.

\* P. 524.

All such uses, as are not within, nor executed by the statute of Co. 1. 27 *H. 8.* but remain at the common-law, may be destroyed, discontinued, or suspended, as uses before the statute might have been. And therefore contingent uses may be extinguished or suspended at this day. As if a man, seised of land in fee, have three sons *A.* *B.* and *C.* and he make a feoffment of his land to divers feoffees, to the use of them and their heirs during the life of *A.* and after to the use of the first son that *A.* shall beget and the heirs male of the body of such first son; or if a feoffment be made to the use of a man and the wife that he shall marry, or the like; if, in these cases, the feoffees make a feoffment over before the contingent uses happen to be in *esse*, as before *A.* have any son, or the man take a wife, &c. albeit it be to one that hath notice of these uses, yet the uses are destroyed for ever, and the feoffees cannot enter and revive \* them contrary to their own feoffment: and if in these cases the feoffees, before the contingent remainder vest, be disseised, hereby the uses are suspended; but then by the re-entry of the feoffees the ancient uses will be revived again: and therefore, if the feoffees release to the disseisor, and so bar themselves of their entry, the uses are extinguished and shall not be revived, and the party grieved hath no remedy but in chancery against the feoffees for breach of trust. And if the feoffees in the first case die before *A.* have any son born, the contingent remainder is gone: as where a feoffment is made to the use of the feoffor for life, and after to the use of the right heirs of *I. S.* in fee, and the feoffor die before *I. S.*; in this case, the remainder is gone, for a remainder cannot be without a particular estate, no more of a use than of an estate made in possession: and such a remainder must vest during the particular estate, or at least *eo instanti* when the particular estate doth end (2).

If a feoffment be made to the use of *I. S.* and the wife he shall afterwards marry, and of the heirs male of their bodies; and *I. S.* make a feoffment of this land to another before he take a wife; hereby the contingent remainder is destroyed. Co. 1. 136.

If *A.* infeoff *B.* and his heirs, to the use of *C.* and *D.* his wife, and the heirs of the survivor of them, and *C.* make a feoffment to *E.* and dieth; this feoffment doth destroy the contingent remainder. Hill. 2 Car. Scaccar. Adjudged.

(1) The particular signification given to the word "*term*", in our ancient law books, and particularly in the Rector of *Chedington's* case, from which the passage in the text is taken, has been exploded by the court of King's Bench in the case of *Wright on the demise of Plowden v. Cartwright*, for the reasons in 1 *Burr.* 282.

(2) The doctrine of contingent uses, and the *scintilla juris* which remains in the feoffees to enable them to enter and revest the old uses, is very fully explained in *Chudleigh's* case, 1 Co. in *Wegg* and *Villers* 2 *Rel. Abr.* 796. pl. 11.—*Gilbert's Uses*, p. 175. and *Hales v. Risley*, *Pellew*, 369.—there are also some very learned and ingenious observations on this subject, in *Fearn's Cent. Rem.* 3d. edit. 215 to 227.

When



Dier 186.

When the estate, out of which the uses do arise, is gone, the uses are gone also; as if a lease be made to *A.* for his life, to the use of *B.* for his life; and *A.* die; hereby the estate of *B.* is gone.

Also uses of lands may be gone by revocation, whereof see in the next part.

Co. super

Lit. 237. 7.

11. 12. 10.

143. 1. 110.

173. 107.

Dier 372.

Provisoes and powers of revocation of uses of lands are very frequent in voluntary conveyances (whether by feoffment or otherwife) that pass land by way of raising of uses, and are executed by the statute of 27 *H.* 8. and the inheritances of many depend thereupon. As if a man seised of land in fee have divers sons, and he covenant to stand seised of that land to the use of himself for life, and after of his eldest son in tail, and for want of such issue, to the use of his second son in tail, &c. with a proviso that it shall be lawful for him at any time during his life to revoke any of the said uses, and to limit and appoint other uses, &c. Or if *A.* by indenture between him and *B.* his heir apparent an infant, covenant with *B.* for the advancement of his blood, &c. to stand seised to the use of himself for life, and after to the use of his said heir apparent and the heirs male of his body, and after to the use of his right heirs, provided that if *A.* by himself or any other during his life shall deliver or offer to *B.* a ring of gold to the intent to \* make void all the same uses, that then the said uses shall be void, and he may limit new uses: or if *A.* by indenture covenant with *B.* to stand seised to the use of himself and his wife and his daughter for their lives, and after, &c. provided that if the said *A.* during his life and after the debts mentioned in the schedule annexed to the indenture shall be paid, shall be disposed to determine, disannul, change, alter, enlarge, diminish or make void the uses, or estates, or any of them, of the premises or any part thereof, and by writing indented under his hand and seal subscribed in the presence of three witnesses shall declare his mind to be so, that then the same uses shall be void; all these, and such like provisos, being coupled with a use are allowed to be good and not repugnant to the former estates. But in case of such a feoffment or other conveyance, whereby the feoffee or grantee is in by the common law, as where *A.* doth infeoff *B.* and his heirs to the use of *B.* and his heirs, it is said such a proviso is meerly repugnant and void. And as touching these provisos or revocations, these things are to be known; 1. These revocations are favourably interpreted, because many mens inheritances depend upon it: and therefore he that hath this power may revoke part of the uses at one time, and part at another time; and the revocation of the old may be made, by the making of new uses without any express revocation; and by the same conveyance whereby the old uses be revoked, the new uses may be created and limited, and then the former uses do cease *ipso facto* by this revocation without any entry or claim (1): as if one covenant to

9. Where a power to revoke uses of land shall be good, and how they shall be taken; and what revocation by reason of such power shall be good, and what not.

\* P. 525.

(1) A power of revocation if executed of the whole estate, can be executed but once, and not *toties quoties*:—but if the person to whom the power of revoking the old uses and of limiting new ones is reserved, does, in the deed of revocation, annex a power of revoking the uses thereby declared, it will be good, and he may afterwards execute that power accordingly.—*Hele v. Bond, Prec. in Cane.* 474.—A person who has a power of revocation, may revoke *part* at one time and *part* at another, but not the *same part twice*, unless he reserves a *new* power of revocation. 1 *Co.* 173. b.—2 *Burr.* 1148.

stand seized to the use of himself and his wife, for their lives, and after to the use of *A.* his daughter for life, and after to the use of *B.* his daughter in tail, &c. provided that if he shall be minded, &c. he may by writing, &c. make void the same uses, and declare the uses to others, and he doth make void the use to his wife at one time and no more, and after by a deed doth limit and appoint new uses of the whole by a new covenant to stand seized to other uses; these are good revocations; for there needs no real and express revocation of former uses, but the creating of new uses is in law an actual revocation of the old uses, as the making of a latter is *ipso facto* a revocation of a former will. 2. The proviso must for the substance of it be pursued in the revocation, and all incident circumstances thereof must be observed, as sealing, subscription of names, witnesses, and the like; otherwise the revocation will not be good. And therefore if the proviso be that if the covenantor shall be minded to revoke, and shall declare his mind by writing indented under his hand and seal, delivered before three witnesses, the uses shall be void; in this case a revocation by word without writing, or by a writing and not indented, or by writing indented and not under hand and seal, or under hand and seal, and \* before two witnesses only, is not good (1). And yet if a proviso be, that if the covenantor shall at any time during his life by writing under his hand and seal delivered before two witnesses revoke the same, &c. the old uses shall be void, and the covenantor by his last will and testament in writing under his hand and seal before two witnesses doth give the land to another, and make no express revocation of the former uses; this is a good revocation in law. If the proviso be, that if the covenantor be minded at any time during his life to revoke the same uses, &c. and shall pay or tender to *A. B.* twenty shillings in such a place; in this case, tender of this twenty shillings in that place, at any time, is not good, unless he happen to meet with *A. B.* at the place, for then tender at any time is good; but otherwise the covenantor must give notice to *A. B.* what time he will tender the twenty shillings in that place, otherwise the revocation is not good. If one be to marry his daughter to the son of another man, and they do mutually covenant to stand seized of their lands to the use of their son and daughter, with proviso to revoke the uses with the consent of the mothers, if they or either of them be then living, and one of them die; in this case a revocation, by the consent of the surviving mother is sufficient. 3. When the covenantor doth make void such uses by virtue of such a revocation, he is seized again of the land in fee-simple, as he was at

(1) But in various cases, where all the circumstances requisite to a revocation are not strictly pursued according to the power, equity will give relief.—where a man made a settlement with power of revocation by any writing under his hand and seal in the presence of three witnesses, and afterwards made his will under his hand and seal, reciting his power and declaring that he revoked the settlement; there were only two subscribing witnesses, though a third was present who died; the chancellor declared this to be “an execution of the power in strictness, though the third witness did not subscribe—and that if there had not, equity should help it in such a little circumstance where the owner had fully declared his intention: where a man has power to make leases, &c. which shall charge and incumber a third person’s estate, such powers are to have a rigid construction; but where the power is to dispose of a man’s own estate, it is to have all the favor imaginable,” 2 Vent. 350.—Equity will relieve, where a man is prevented by the fraud of any one from pursuing all the circumstances in the power,—or where he is prevented by accident, or by the act of God, or by necessity; and equity will aid a defective execution of a power, in many instances, pointed out in *Com. Dig.* Chancery (4 O.) *Pear* (C).—*Vin. Abr.* Powers (A. 17.)—(C.)

Co. 1. 111. first, without any entry or claim. 4. This power of revocation, whether it be present, as those before and most are, or future, as when they are upon a contingent, as if the covenantor over-live *I. S.* or the like, when it is reserved to the party himself that made the uses, may by his fine, or feoffment, be utterly extinguished; as if he make a feoffment, or levy a fine of the land whereunto the uses and proviso are annexed; by this the proviso is extinct; and yet so, as if he make a feoffment, or levy a fine of part of the land only, this shall extinguish his power but to that part only (1): but if the power be reserved to a stranger, it seems the fine or feoffment of him that made it, will not extinguish it (2). This power also, when it is present, may be extinguished by a release, made by him that hath the power, to any one that hath any estate of frank-tenement in the land in possession, reversion, or remainder; or it may be avoided by defeasance, whether it be present or Defeasance future (3).

Crompt. Jur. 48. 59. 58. If one convey his lands to certain friends in trust, to the intent that they shall convey it to such persons as he shall set down in his last will and testament; or if a man deliver money to a friend in trust to purchase land for him and his heirs, to the end that he may have the profits thereof for his life, and to the end \* it may be conveyed to them afterwards (4): or if a man deliver money to his friends to buy land for him that doth deliver the money in his own name; or if a man enfeoff his friend, and his heirs of land, to the intent that he shall alien the land to whom *I. S.* shall appoint; or if land be conveyed to me in mortgage, and I pay all the mortgage money, but I, to prevent the jointure of my wife, or for some such like cause, name a friend joint purchaser with me, and so the conveyance is made to us both; if in any of these cases, or in any other such like case, the friends trusted prove false, and do not perform the trust, but turn the profits of the land to their own use, or refuse to settle it according to the trust, or the like, the party grieved must have his remedy in chancery; for these are not trusts or uses within the statute, nor such for which there is any remedy at the common law; and in that case where the land is settled, to the intent that the friends trusted shall settle it where *I. S.* shall appoint, if *I. S.* do not appoint how it shall be settled, it seems the feoffees shall have it to their own use (5).

Dier 160. Fitz. Account 122. 10. Other trusts and confidences of lands and of chattels real and personal, the nature of such trusts, the duty of them that are trusted, and the remedy to be had against them for breach of their trust. \* P. 527.

Crompt. Jur. 65. Dier 369. Bro. Feoffment all use 60. And if a man give or grant his goods or chattels, as leases for years, or the like, to friends in trust to the use of himself for life, and after to perform his will, or the like; these are such

(1) *A.* being seised in fee made a conveyance to himself for life, remainder to his first and other sons in tail, remainder over, remainder to his own right heirs, with a power by deed, sealed in the presence of two witnesses, to revoke these uses, and to limit new ones. After this *A.* levied a fine, and a week after the fine levied by deed declared, that the intent of the parties at the time of levying the fine was, that the fine should be to the use of *A.* and his heirs, and to no other use; and the question was, whether this fine had extinguished the power of revocation, so that the declaration of uses came too late. Adjudged, that the power of revocation was extinct; but this judgment in *C. B.* was reversed in the Exchequer Chamber by six judges against two. *Herring v. Brown*.—*Skin.* 185.

(2) See accordingly in the case of *Willis v. Shorral* in 1 *Atk.* 474.

(3) See more amply as to the nature of powers of revocation—How they should be framed, in what manner they are to be executed, and how they may be extinguished or destroyed, in *Bac. Abr.* Uses and Trusts (G) 2 *Bl. Com.* 335.—*Com. Dig.* Uses (L. 2.)—*Fin. Abr.* Powers (E.)—and the opinion at the end of this chapter.

(4) Where money is agreed or directed to be laid out in the purchase of lands to be settled to such and such uses, every person interested shall have the same benefit, if the parties die without a settlement, as he would have had if the lands had been settled.—2 *Pr. Wms.* 174.

(5) But in equity, in this case the feoffees would be trustees for *I. S.*—See the note to fol. 482. before.

uses



uses and trusts are not within the statute of uses, and for the breach of which there is no remedy at the common law but in chancery only. So if an obligation or statute be made to *A. B.* to the use of *C. D.* this is a trust of the same nature; and if *A. B.* release the obligation without the consent of *C. D.* or get the money into his own hands, *C. D.* shall have relief in chancery; and in all these and such like cases, the general rules, by which uses were governed at the common-law, are still in force, and to take place as those by which uses and trusts are now for the most part governed. As first, if there be any cause to sue for or about the lands or goods wherewith the parties are trusted, as if they deny or delay to perform the trust, they must be compelled thereunto by suit in chancery. Secondly, the *cestuy que use*, or party for whom the trust is, cannot of himself dispose of the lands or goods, for the property and interest in law is in the trustees; and if it be an obligation or statute that is made to the use of another, *cestuy que use* cannot release it, but the trustee must release it. Thirdly, if the party trusted so with lands, goods, or chattels, give, grant, or sell the same lands, goods, or chattels, to one that hath knowledge of the same uses or trusts; (as it is always presumed he hath where the trusts are expressed upon the same deed, by which the lands, goods, or chattels are given or granted;) or if the thing, so given or granted, be granted upon the same trusts, or to the same uses, or without any consideration at all; in these \*cases, he to whom the thing whereabout the trust is, shall have the same thing upon the same trust and to the same use, as he that did give or grant the same had it. But in case, where no trust or use is expressed upon the deed, and the purchaser or buyer hath no notice or knowledge of the use or trust, and he gives a valuable consideration for the thing, there for the most part the sale is good, and the party grieved thereby hath no remedy but against the party first trusted in Chancery; and the purchaser shall have and enjoy the thing so bought to his own use for ever; but he that is the party trusted, will be forced in Chancery to make the party grieved an amends in damages for this breach of trust; and if there be any practise, packing, or combination between the buyer and the seller in the matter, there perhaps the suit may hold them both, and the buyer may be forced to restore the thing itself. And yet if *A.* enter into a statute to *B.* and *C.* to the use of *B.* and *A.* having notice of this use doth get a release from *C.* in this case it seems *B.* must have his whole remedy against *C.* and shall have no remedy against *A.* 4. If the trustor or *cestuy que use* in these cases commit felony, &c. so that the things if he had the property of them were forfeit; in this case, it seems that neither they nor their heirs, executors, &c. nor yet the Lord, &c. shall have them, but the trustees shall keep them for ever. 5. If the *cestuy que use* or trustors die and appoint how the same thing shall be disposed of, the trustees are bound to see it done; as if the testator appoint it shall pay his debts, or provide legacies, the parties trusted must take care it be so employed; and in this case, the debtors and legatees also may compel the trustees in Chancery. 6 In all these cases regularly the thing whereof the trust is, is in equity at the disposing of him that is the *cestuy que use*, unless he do otherwise appoint it; and if at his death he make no disposition thereof it shall go to his heir, executor, &c. 7. In all these cases the trustees shall have their reasonable allowance in Chancery for whatsoever they have laid out about the land, &c. in suits or otherwise for the profit of the trustor. Out of all which

\* P. 528.

8 H. 7. 11.

Crompt. Jur.  
62. 45.  
11 Ed. 4. 2.

7 Ed. 4. 29.

7 Ed. 4. 29.  
Crompt. Jur.  
62, 63, 65.  
11 Ed. 4.  
24 Ed. 4. 37.

11 Ed. 4. 8.

Bro. Feoff.  
34.15 H. 7. 12.  
Crompt. Jur.  
54.

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which may appear how dangerous it is for a man to meddle with any lands, goods, or chattels so conveyed or settled in trust; for the *cestuy que use* or trustors have no property in the thing, and therefore they cannot sell or give it, and the trustee hath it but to another's use; and it is not safe therefore to deal with either of them alone, nor yet indeed safe to deal at all in these cases, unless the buyer may have the consent, sale, and assurance, or the release, &c. of the trustors and trustees \* altogether; and if there be any \* P. 529.

7 Ed. 6. 14.  
Fitz. Sub-  
pœna 5.

ous. And if goods or chattels be given to, or to the use of a feme covert, or infant, and certain friends are trusted therewith, if they do sell or give away these goods or chattels contrary to the trust, they must be sure to answer it: if therefore they sell them, let them see that the money made thereof be as beneficial, and be bestowed for the wife or children; for it seems it is not sufficient in this case, that the money made thereof be paid to them.

The editor thinks he cannot conclude the few notes he has ventured to add to this very excellent and concise treatise on uses, in any manner more acceptable to the reader, than by subjoining a copy of an elaborate opinion of the late Mr. *Booth* on the operation of the statutes of uses, the doctrine of executory fees, and powers of revocation.

## C A S E.

*A.* Tenant in tail and her husband, by articles previous to their marriage, agree to settle an estate to uses.—*A.* and her husband join in making a tenant to the precipe and suffering a recovery, and declare the same to such uses, as they, or the survivor of them, should by deed or will appoint.—Then, in pursuance of the articles, they make a settlement, and appoint the premises, to the use of the intended husband for life, remainder to his wife for life, remainder to trustees to preserve the contingent remainders, remainder to the use of the articles—reserving a power to the two trustees to preserve remainders, in whom no estate was then vested but by way of remainder, to sell and convey, so as the money be laid out in the purchase of other lands to be settled to the same uses.

Can such trustees convey a good estate in fee to a purchaser under the power, having no estate vested in them?

By the old law no fee-simple could be limited upon or after a fee-simple; but since the statute of uses, executory fees, by way of use, have not only been allowed, but are become frequent in all conveyances, operating by way of transmutation of possession, the uses are served out of the seisin of the feoffees, grantees, releasees, &c.—In all future or executory uses, there is, the instant they come in *esse*, a sufficient degree of seizin supposed to be laid in the feoffees, grantees, &c. to knit itself to, and support those uses; so as that it may be truly said, the feoffees or grantees stand seised to those uses, and then, by the force of the statute, the *cestuy que use* is immediately put into the actual possession.—It is wholly immaterial how, or by what means, the future use comes in *esse*; whether by means of some event provided for, in case it happened, in the creation of the uses, which event may be called the act of God; or by means of some work performed by any certain person, for which provision was likewise made, in the creation of the uses, which may be called the act of man; in either case, the statute operates the same way; for the instant the future use comes in *esse*, either by the act of God, or by the act of man, the statute executes the possession to the use, and the *cestuy que use* is deemed to have the same estate in the lands as is marked out in the use, by the deed that created it. When the use arises from an event provided for by the deed, it is called a future, a contingent, an executory use; when it arises from the act of some agent or person nominated in the deed, it is called, a use arising from the execution of a power. In truth both are future or contingent uses till the act is done; and afterwards they are, by the operation of the statute, actual estates.—But till done they are in suspense, the one depending on the will of Heaven whether the event shall happen or not, the other on the will of man.

Whilst these last are in suspense, they are called powers: It is absolutely immaterial to the creation of the powers, whether they are reserved to the parties that created the uses, or to any one having any actual use or estate under any limitation in the deed of uses, or to the feoffees, grantees, or releasees, or to an absolute stranger.—They all operate the same way; indeed they have different names according as they are reserved to the persons aforesaid, and different rules are established for their interpretation, as they are of one kind, or another.—Some are powers appendant, some are powers in gross, some are powers collateral; but still the statute executes the possession to the use that arises on their execution, in the same manner, and by the same method of operation. Sir Thomas Jones 110. *How and Wingfield*.

Every settlement, made with skill for these last hundred years can furnish something by way of example to illustrate these principles.—Take a settlement made before the statute of K. Wil. 3d. to enable posthumous children to take as if born in the life of the father: you will find it perhaps thus, To the use of the intended husband and his heirs till the intended marriage,—after the marriage, To the use of the said husband

husband for life,—remainder to trustees for his life to preserve contingencies, remainder to the use of such husband's first and other sons born in his life-time in tail, remainder to the intended wife enceint at his death, and her assigns till the birth of one or more posthumous sons, and from and after the birth of any such posthumous sons, to every of them successively in tail, and for default of such issue, to the use of all and every the daughters of the husband as tenants in common in tail, with remainders over; and with powers for the husband during his life to make leases, and powers for the guardians of the infant son when their estates take effect in possession, in like manner to make such leases, &c.

Here, under the limitations of these, and such like settlements, you will find the uses continually to vary, and all to arise out of the seizin of the releasees; before marriage the intended husband is seized in fee; then upon the marriage his estate in fee ceases, and a new use springs up, under which he is tenant for life, with the further uses in contingency;—then on the birth of a son, that son becomes tenant in tail, and also on the birth of every other son a new use or estate in remainder springs up to every such son in tail; on the birth of a daughter, she becomes intitled by way of use to a remainder in tail; on the birth of another daughter, that last remainder in tail ceases, and both daughters become intitled by way of use to a tenancy in common in remainder in tail. Then if the husband dies leaving a child in *ventre matris*, a use vests in the mother till the birth of that child, and then that use devests, and the same event carries an estate tail to that child. So where the father makes a lease under his power, a use vests in the lessee for such estate as the lease gives, and such lessee's use or estate takes place before and settles itself over all the uses; it is the same as a lease made by a guardian to any of the infant children, (which guardian is a perfect stranger to the parties at the time of the original settlement,) there the use or estate, given by the lease made under the power, over-reaches all the other uses, and takes place before them; and this is done by the operation of the statute, just in the same way as any other use would arise, under any of the limitations contained in the settlement.

Feoffment to *A.* and his heirs, and if *B.* pays 100*l.* to *I. S.* then to the use of *B.* and his heirs; here on the payment of the money the estate of *A.* ceases, and the use executes in *B.* and his heirs.—This case is cited in many books, and the case of *Lloyd and Carew*, in *Sh. P. C.* 137, 138. is to the same effect.

*A.* levies a fine of the manors of *D.* and *S.* and declares the use by deed, as to the manor of *D.* to the use of *B.* and his heirs, and as to the manor of *S.* to the use of *A.* and his heirs, till *B.* or his heirs are evicted by the wife of *A.* of the said manor of *D.* and after such eviction, to the use of *B.* and his heirs: this is a contingent use of the manor of *S.* so that a use will vest in *B.* whenever any eviction happens, and then the use in *A.* ceases.—2 *Rel. Abr.* 792.—In settlements on younger sons of peers or of dignified persons, there are frequently provisions that if such a dignity, or such a family estate, descends on them, then the use to them to cease as if they were dead without issue, and then the premises to go over to the next in remainder; this is an actual revocation, when the contingency happens.

It remains only to shew, that not only the happening of an event by the act of God, but also the performance of any particular act by a stranger, will devest an old use, and give birth to and establish a new one.

Now powers of revocation do in their execution operate this way, and do devest or repeal and determine the old uses, and set up and establish new ones. The execution of these new uses is by force of the statute, just as the execution of contingent or future uses.—The books say that when a power is executed it becomes a limitation; but as these powers of revocation are in fact generally reserved to the grantors as first owners of the estate, it may be proper to shew that the books make no distinction, but allow all kinds of powers to be limited to strangers; and nothing suits this purpose better than to cite the words of Lord Hale, in the case of *Edwards and Slater in Hardres* 410, 415.—Powers to raise estates are either *simply collateral*, as where a party that hath such powers has not even had any estate in the land, as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is but a bare nomination; or *not simply collateral*, which are of several sorts, not material to this purpose.

Here you see Lord Hale takes it for granted that a power to raise uses may be reserved or limited to a perfect stranger.

Lord Coke's opinion in *Co. Lit.* 237. is the same; he tells you that powers in voluntary settlements are founded on the statute which executes them as uses; then he explains the nature of powers of revocation of uses, and what consequences are incident thereto, as that they may be released or extinguished when reserved to the original grantor, or to any one claiming any estate or interest in the deed; but he saith, if he that hath power of revocation, *hath no present interest in the land*, nor by the cessor of the estate *shall have nothing*, then his feoffment, fine, &c. of the land is no extinguishment of his power, because it is merely *collateral to the land*.—If a power to revoke uses may be reserved to a stranger, a power to raise or appoint future uses for a particular purpose may surely be reserved to a stranger too.

The reserving of powers of revocation to the grantors or original owners of the land, though chequed by requiring the consent of the trustees, hath of late been disused in settlements, because doubts have arisen whether such settlements are not fraudulent within the statute of 27 *Eliz.*—See Sir Thomas Jones 94, 95, *Buller and Waterhouse*.

Powers to enable grantors or owners to revoke, or to sell or convey in exchange,—*first settling other lands of equal value to the same uses*, have been found inconvenient; because, though it may be easy to sell an estate and lay out the money in the purchase of a new one, yet it is by no means easy to settle a new estate, before you have sold the old one.—Few people are in circumstances to buy new estates, till they have sold their old ones.

But the vesting a power in the releasees (who themselves have a *scintilla juris* to serve and feed the uses when they arise) to sell and convey, and adding that *when they receive the purchase-money, and sign a receipt for the same under their hands, the releasees shall stand seized, and the conveyances shall enure To the use of the purchasers in fee*, with proper trusts concerning the laying out the purchase-money; this answers every purpose. I found this method used and practised by Mr. Ward and others long before my being in business, and I always use this method to this day.



Lincoln's Inn, 23d June, 1761.



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